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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1274.

FRANK R. WEST, *Petitioner*,

VERSUS

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Frank R. West, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on February 10, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and appears as Appendix A to this petition. The Court of Appeals affirmed a judgment entered after a bench trial, without jury, by the United States District Court for the District of Nebraska, which found petitioner guilty on 24 counts of 105-count indictment. Petitioner was found guilty under the federal Mail Frauds Statute (18 U.S.C. § 1341) and the federal Wire Frauds Statute (18 U.S.C. § 1343).

Petitioner was sentenced to two years imprisonment on each count with sentences to run concurrently, and assessed a fine of $1,000 on each count. Petitioner was also directed to pay one-half of the costs of prosecution. However, the District Court suspended execution of the sentence of imprisonment and placed Petitioner on probation for a period of two years. The Memorandum of the District Court was reported at 407 F.Supp. 1148 (D. Neb. 1976) and appears as Appendix B to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This petition for writ of certiorari is filed within thirty days of the judgment of the Court of Appeals (February 10, 1977).

QUESTIONS PRESENTED

1. Whether the Mail Frauds Statute (18 U.S.C. § 1341) and the Wire Frauds Statute (18 U.S.C. § 1343) apply in a case where the claimed fraud resulted from a contract breached by a business failure?

2. Whether the indictment should have been quashed because irregularities in the second grand jury proceedings substantially prejudiced the rights of the petitioner?

3. Whether the evidence was sufficient to support petitioner's conviction?

4. Whether the judgment and findings of the District Court were so inconsistent that petitioner's conviction was contrary to law?

CONSTITUTIONAL PROVISIONS AND STATUTES

The Mail Frauds Statute, 18 U.S.C. § 1341; Wire Frauds Statute, 18 U.S.C. § 1343; and the Fifth Amendment to the United States Constitution appear as Appendix D to this petition.

STATEMENT OF THE CASE

This criminal action was brought after American Beef Packers, Inc. (ABP) and Beefland International, Inc. sought on January 7, 1975, the protection of Chapter XI of the Federal Bankruptcy Act (11 U.S.C. § 701, *et seq.*).

A grand jury was impaneled on December 12, 1973, which proceeded to investigate ABP and the events surrounding the necessity of ABP's seeking the protection of Chapter XI of the Federal Bankruptcy Laws. The many transcripts of portions of those proceedings before that first grand jury supplied by the United States Attorney to the defendants during the course of this trial under the Jencks Act (18 U.S.C. § 3500), and under Rule 16 of the Federal Rules of Criminal Procedure, reveal that the first grand jury heard testimony from dozens of witnesses having direct personal knowledge of the transactions involved and events leading up to the filing of that Chapter XI Bankruptcy. That grand jury, which ended its service in June of 1975, a period over six months after the filing for bankruptcy by American Beef Packers, Inc., did not indict any of the defendants in this action.

On August 5, 1975, a new grand jury was convened in Omaha, Nebraska. Within only three days thereafter, on

August 8, 1975, the grand jury returned a 105-count, 67-page indictment against American Beef Packers, Inc., Beefland International, Frank R. West and Robert E. Lee. On the same day, it also returned a 7-page indictment against Mr. West and Mr. Don Carlson on matters unrelated to the indictment against these defendants. The trial to the court of the same matters required a period of four weeks. The new grand jury on the same day also returned 14 other separate and unrelated indictments (Appendix C).

No American Beef Packers or Beefland International officer, director or employee appeared before the second grand jury, although they and many other vital witnesses were in the Omaha area and could have easily been subpoenaed.

In addition, as opposed to the practice of the first grand jury proceedings, there were no written transcripts made of the proceedings before the second grand jury. The 67-page, 105-count indictment charged American Beef Packers, Inc., Beefland International, Inc., and their President and Chairman of the Board, Frank R. West, and the Vice President, Robert E. Lee, with devising a scheme to defraud with the use of the United States Mails and telephones, by means of fraudulent pretenses, representations and promises, all of the following persons and business entities:

1. General Electric Credit Corporation (hereinafter GECC), the corporation's main-line creditor.
2. Cattle feeders and producers and hog feeders and producers referred to in a schedule to the indictment.

3. Eight separate banks.
4. The stockholders of the corporations.
5. Other creditors.

The indictment charges that from on or about June 1, 1974, the defendants concocted and devised a scheme to defraud those persons in violation of 18 U.S.C. §§ 1341, 1343, 2314, 371 and 2.

The scheme alleged by the Government is that the defendants planned to, and did, breach the lending contract the corporations had with GECC; that the defendants attempted to gather as much additional monies as possible from various sources with the intent of filing for a limited bankruptcy. The 26 acts alleged to be part and parcel of the scheme to defraud included, among other allegations, the setting up of bank accounts at distant places so that the corporation checks would not be presented for payment for an extended period of time; the signing of a forebearance agreement on the repayment debt of American Beef Packers, Inc.; the holding of various meetings to discuss bankruptcy; various preferential payments to friends of Frank R. West; holding invoices and checks for additional days; and the acceptance and slaughtering of livestock when the defendants knew that there would not be money to pay for them.

Prior to trial, Motions to Quash the Indictment were filed based upon irregularities in the presentment of the case to a second grand jury thereby abridging the defendants' rights under the Fifth Amendment to the United States Constitution. The District Court held an *in camera* hearing with the United States Attorney, excluding defense

counsel, to inquire into the grand jury proceedings and to rule on the Motions to Quash the Indictment. The District Court denied the Motions to Quash the Indictment and sealed the record of the *in camera* hearing.

The case was tried before the Honorable Robert V. Denney, United States District Judge for the District of Nebraska, without a jury, upon the pleas of not guilty of each of the defendants. At the end of the Government's case-in-chief, Judge Denney dismissed Beefland International, Inc. and Robert E. Lee as party defendants. At the end of all of the evidence, the court dismissed all counts as to petitioner except those relating to the diversion of funds from GECC.

On January 21, 1976, the District Court found American Beef Packers, Inc. and petitioner guilty of certain of the remaining counts, and not guilty of others. The petitioner was convicted of 18 counts under the Mail Frauds Statute (18 U.S.C. § 1341) and 6 counts under the Wire Frauds Statute (18 U.S.C. § 1343). These counts dealt with the breach of a loan agreement between ABP and GECC. The facts are that ABP prior to 1972 had received its financing from the J. I. Talcott Company. ABP sought to enter into an agreement in 1972 with GECC for both the short term revolving line of credit and a long term loan agreement. On June 28, 1972, an agreement with regard to two accounts receivable of financing was entered into between GECC and ABP. This agreement allowed ABP a $41,000,000.00 revolving line of credit. This line of credit was secured by the accounts receivable of ABP and other security.

The agreement provided that ABP's limit on a revolving line of credit which was not to exceed 90 per cent of the "eligible receivables" and 60 per cent of all inventory. Eligible receivables became ineligible for the purpose of determining the amount of loan commitment from GECC after 30 days. Although the contract did not specifically call for all monies to be sent to "lock boxes," such arrangements were set up in various cities around the country whereby the checks, when received, would be credited as payment on the American Beef Packers' loan balance.

GECC was granted under the contract the right to audit ABP's books and accounts under the terms of the agreement. In fact, GECC had its auditors fully inspect those books at ABP's headquarters on a quarterly basis. GECC was also supplied with monthly financial statements, computer printouts, inventory reports and weekly aging reports by ABP.

Originally, the lock boxes were established by the parties so that quick payments could be made to reduce ABP account and the interest they were paying thereon, which often was extremely high. To solve the problem of accounts receivable being sent directly to Omaha rather than to a lock box, an account was established at The Omaha National Bank which was specifically handled via transfers and inadvertent payments to ABP. This account was to accept the wire transfers and to report the same to GECC.

During the year 1974, American Beef Packers ran into various financial difficulties. ABP was constructing a new plant that was costing significantly more than was expected and the price of the cattle market fell substantially. Addi-

tional financing had become extremely difficult in view of the general tight money situation and ABP tried to obtain additional financing from other parties. Beginning in 1973, an ABP employee on several occasions requested certain customers to send payments of their accounts directly to ABP rather than a lock box. ABP would for several days put those monies in the Northwest National Bank account before being remitted to the lock boxes. These "diversions" did not decrease the interest that ABP had to pay on this money and did not allow additional monies to be borrowed from GECC. These diversions did not increase the amount of the accounts receivable, decrease interest payments from ABP to GECC nor reduce GECC to an under-secured position. This practice of diverting funds continued from 1973 until December, 1974, when the diversion was "discovered" by GECC.

From December 18, 1974 through December 31, 1974, representatives of ABP and GECC met to discuss the diversion and proposals for repayment. On December 31, 1974, a forebearance agreement was signed by ABP and GECC allowing ABP 30 days to pay back the amount over-advanced under the diversion practice. It was agreed that GECC would be given additional collateral and that the financing agreement would continue in effect.

The financial condition of ABP continued to deteriorate and on January 7, 1975, it sought the protection of Chapter XI of the Federal Bankruptcy Act (11 U.S.C. § 701, *et seq.*)

REASONS FOR THE ALLOWANCE OF THE WRIT

In this petition, several issues have been presented which are believed to be of great importance and merit review by this Court. The first issue which is concerned with the Mail Frauds and Wire Frauds Statutes is of great importance in the administration of justice, because of the growing burden upon the federal courts which results from the misuse of these two statutes. Another important issue raised in this petition which warrants review is whether use of the grand jury as a prosecutor's tool to return an indictment where it was clearly impossible for the grand jury to investigate the matter, constitutes a denial of the Fifth Amendment right to a grand jury.

I.

THE MAIL FRAUDS STATUTE (18 U.S.C. § 1341) AND THE WIRE FRAUDS STATUTE (18 U.S.C. § 1343) WERE NOT ENACTED OR INTENDED TO APPLY TO A BREACH OF CONTRACT.

Petitioner was convicted primarily of the counts relative to the allegations that petitioner and ABP violated the loan agreement ABP had with GECC by diverting funds, for an excessive period of time not sanctioned by the loan agreement, from certain despository lock boxes, thereby allowing ABP to use collected receivables for an extended period of time.

The violation charged, then, is a contract violation between ABP and GECC. Evidence did show that ABP did hold monies longer than the ten (10) days allowed to them

under the contract before a default situation would exist. However, the record is abundantly clear that during the latter part of 1974, ABP was facing many serious financial problems. This was not a case in which a fraudulent scheme was entered into prior to making an agreement, but rather involved the use of money for several additional days because of the financial misfortunes of ABP. This was at most a breach of a contract caused by ABP's temporary cramped financial position. It is difficult to believe that Congress intended to elevate such breaches to criminal proportions by the enactment of the mail and wire fraud statutes.

There is a real and vital distinction between business projects which end and result in loss and disaster to the investors, and schemes which were intended to defraud their victims. The Mail Frauds Statute applies to the latter rather than the former. *United States* v. *Bachman*, 246 F. 1009 (E.D. Pa. 1917). See also, *United States* v *Platt*, 435 F.2d 220.

The mail fraud and wire fraud statutes, even as amended, were not intended to cover every breach of contract or even frauds at common law. Rather the purpose of the statute was to "prevent the circulation through the mails of cunning appeals to human passion for gain by untruthful and seductive embellishment of advantages of engaging in ventures, begetting confidence where it would not otherwise be bestowed, and luring persons of ordinary prudence and intelligence into fraudulent transactions and ventures, in which they would not otherwise be persuaded to embark." *Etheredge* v. *United States*, 186 F. 434 (5th Cir. 1911), at 441.

II.

THE INDICTMENT WAS RENDERED INVALID BY UNCONSTITUTIONAL ACTS AND PROCEEDINGS OF THE GRAND JURY SUBSTANTIALLY PREJUDICING THE RIGHTS OF PETITIONER.

The several thousand pages of testimony involved in the presentment of this case, the stipulations contained herein and the indictment itself demonstrate that the indictment against American Beef Packers and Beefland International alleged complicated transactions involving many persons in many different states. These transactions totaled millions of dollars, occurring over a period of more than six months and consisted of many telephone calls, purchases, mailings, interstate travels, meetings and many other transactions and occurrences. The indictment charged that by various fraudulent activities, banks, stockholders, lending institutions and cattle feeders were fraudulently deprived of over $20 million in cash.

It was clearly impossible for the second grand jury during that three-day period to properly investigate or consider the factual allegations contained in the indictment against the defendants. This case simply involved too many people, too much money, too many transactions and too long a time for the grand jury to have even superficially investigated the facts alleged in the scheme to defraud and to have prepared a 105-count, 67-page indictment against this defendant. It appears that the grand jurors could only have been "spoon-fed" by the prosecutor with excerpts or summations of transcripts before the first grand jury (which did not indict); with summaries of documents; or with the benefit only of testimony of government witnesses. The

extent to which even this limited amount of information could have been given to the second grand jury must be questioned in light of the 15 other indictments handed down at the same time after only 3 days for hearing evidence, deliberating and voting on all of them (see Appendix C).

While the facts known imply that this is true, much of what was done before the grand jury is obscured since the United States Attorney admitted in open court that there were no written transcripts made of the second grand jury proceedings, as there had been in the first grand jury proceedings.

Not only does the failure to keep minutes make it much more difficult for the defendant to inspect grand jury proceedings, but it also creates grave doubts and suspicions of the validity of the indictment and raises the possibility that the indictment was obtained in violation of the defendants' constitutional right not to be held for offenses except on a lawful indictment of a grand jury.

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * "

If the grand jury is to meet its constitutional function, it is obligated to consider the evidence fully before it indicts a defendant. This Court has best described the function of the grand jury as follows:

> "Historically this body has been regarded as a primary security to the innocent against hasty malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 8 L.Ed.2d 569, 580 (1962).

Indeed, the grand jury must perform two very important roles of determining probable cause and effectively protecting citizens from unfounded criminal prosecutions in the administration of criminal law. *Branzburg* v. *Hayes*, 408 U.S. 665, 686, 92 S.Ct. 2646, 33 L.Ed.2d 626, 643 (1972); *United States* v. *Bailey*, 332 F.Supp. 1351 (N.D. Ill. 1971); *In re Grand Jury January, 1969*, 315 F.Supp. 662 (D. Md. 1970). In this regard, their judgment cannot be the act or judgment of the prosecutor which has been enforced upon them. *Hoffman* v. *United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); *United States* v. *DiGrazia*, 213 F.Supp. 232 (N.D. Ill. 1963). It must have free access to all relevant information and evidence, unencumbered by the acts of the prosecution.

In *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Court held:

> "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

In *Ex Parte Bain*, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1887), the Court stated:

> "No person shall be required, according to the fundamental law of the country, except in cases mentioned,

to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare *upon careful deliberation*, under the solemnity of an oath, that there is good reason for his accusation and trial." (Emphasis supplied.)

In *Gaither* v. *United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969), the Court stated:

"We conclude then that Rule 6 requires the grand jury as a body to pass on the actual terms of an indictment. We are impelled to this conclusion largely by the constitutional principles in *Bain*, *Stirone*, and *Russell*, which emphasize the right of the accused to be tried on an indictment *which has in each material particular been approved by a grand jury.*" (Emphasis supplied.)

The second grand jury in the instant case clearly was not able to perform its function, of fully, fairly and freely investigating the evidence available to determine whether or not probable cause existed to indict this defendant of a serious crime. It was denied its right to thoroughly hear and judge the quality of the evidence that was available. It was therefore not a true indictment of a grand jury.

In considering the motions to quash, the Court met with the prosecutors in this case for the purpose of questioning the prosecutors about the deliberations before the second grand jury. This petitioner has no knowledge of what transpired therein, and has been prejudiced by his inability to ask pertinent questions of the United States Attorney about this highly unusual and suspect proceeding.

This Court, in a case concerning *in camera* inspection of evidence, recently held as follows:

"Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

"Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." *Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed. 176 at 192-193.

Furthermore, this practice, in various Jencks Acts cases has been highly condemned by the circuit courts (*United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965); and *United States* v. *Schipani*, 352 F.2d 825 (2d Cir. 1966), as being violative both of the defendant's constitutional rights and of Canon 17 of the Laws of Ethics.

"* * * *In the absence of some extraordinary circumstance all proceedings affecting the trial should be*

conducted in the presence of counsel for both sides. United States v. *Persico*, 349 F. 2d 6." (Emphasis supplied.)

In sum, the petitioner has been thwarted in his ability to discover precisely what occurred before the second grand jury. The lack of any grand jury minutes, the closed *in camera* proceedings and the closed nature of the grand jury process have made the petitioner's task almost impossible. However, the petitioner thoroughly believes that he has presented sufficient facts to establish a prima facie case that there must have been substantial irregularities before the second grand jury.

III.

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTION OF PETITIONER.

In *United States* v. *United States Gypsum Company*, 33 U.S. 364 (1948), the Court, at page 395, held:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In *United States* v. *Delerine*, 457 F.2d 156, 160 (3d Cir. 1972), Judge Aldisert, having quoted the above language from *U. S. Gypsum, supra*, went on to state:

> "So defined, this standard obviously turns on the quantum of evidence on the record: a mere scintilla will not suffice; the evidence must rise to at least that degree which a reasonable mind might accept to support a conclusion."

In *Hofman* v. *United States*, 353 F.2d 188, 191 (10th Cir. 1965), a mail fraud case, the Court stated:

> "The essential matter of proof in the Government's case is the knowing participation in a scheme to defraud in which the mails were used."

Petitioner submits that a review of the record in light of the above authority conclusively establishes that there is not substantial evidence from which his guilt can be established beyond a reasonable doubt.

First, as to petitioner's knowledge of the diversion, the court has found:

(1) That he had personal knowledge of the diversion at least as early as June, 1974;

(2) That he knew the approximate size of the diversion each month;

(3) That he knew that the diversion was effectuated by requesting customers to mail their checks to ABP rather than to GECC; and

(4) That he knew that it was necessary to transmit false information to GECC to maintain the diversion.

The court bases these findings on (1) the testimony of Mr. Taphorn, (2) of Mr. Clark, (3) of the petitioner, and (4) the fact that petitioner was President, Chairman of the Board, the largest single stockholder of ABP, and his office was the site of frequent informal meetings on all phases of the corporate operation.

Mr. Taphorn, testifying under a grant of immunity, stated that he had told petitioner that,

"Well, basically, *that we were* into GECC for a couple of million bucks and we got to get them paid back."

The witness and the petitioner discussed ways to get GECC paid back. Other testimony did not touch on petitioner.

Mr. Taphorn's testimony is the only evidence which could in any degree support the court's finding that petitioner had personal knowledge of the diversion at least as early as June, 1974. The most cursory examination of the record shows that the most petitioner could have known from Taphorn was that ABP was "into GECC for a couple of million bucks. . . ." At no time did Taphorn describe to petitioner in the barest of outlines the practices which led to the condition of being "into" GECC, and petitioner submits that such knowledge, let alone criminal intent, cannot be imputed to him on the basis of such testimony, and this is so *a fortiori* when the testimony is viewed in the light of its form and source: leading questions asked by the Government of its own witness to whom it had granted immunity.

The court next relies upon the testimony of the petitioner himself which the court characterizes as admitting "at least some knowledge of the *diversion*." The testimony referred to does not support the characterization. The question and answer beginning at page 2000 of the transcript and immediately preceding the portion quoted by the court in its decision sets the tone for the portion quoted:

"Q. Didn't during the course of his employment with American Beef, Mr. Taphorn tell you on numerous occasions that you were spending too much money on bricks and mortar and you didn't have the cash?

A. No. Mr. Taphorn came to me afterwards, after the money was already spent, and then—then couldn't own up to the truth and tell exactly what he had spent.

A. Didn't he recommend to you that you stop spending money on Dumas?

A. No.

Q. Didn't he on numerous occasions tell you you had to sell cattle that you were holding, your own cattle, so that you could pay back GE?

A. No. I will explain if you would like. Mr. Taphorn would come to us and tell us he would be in trouble on his loan and be over extended.

Q. He would tell you you were over extended with GE?

A. I am not done. That he is going to be into GE, and he would ask us how many cattle we intended to kill, how many hours we intended to work, and from there we would figure out whether we had to kill less cattle or sell feedlot cattle and if the cattle were fat—we never sold cattle that wasn't fat" (Tr. 2000-2001).

The emphasis on this line of questioning is on the construction of the Dumas plant, and the lack of adequate long-term financing. GECC in addition to the short-term line of credit, also had a long-term loan to ABP for the construction of the Dumas plant, *i.e.*, a "brick and mortar" loan. The inference is equally strong from the above quoted portion of the transcript that the "trouble on his loan" is in reference to the long-term loan, particularly in light of the fact that the Dumas plant construction costs were far exceeding the original estimates. "That he *is going to be* into GE" (em-

phasis added) does not reflect a present condition, but rather reflects a condition which *could* occur if cash is not generated from the slaughter and feedlot operations. To say the least, this is not evidence which supports a conviction beyond a reasonable doubt.

With reference to the diversions after June, 1974, Thomas J. Clark, successor to Mr. Taphorn, testified that he discussed the "cash shortage" (not the diversion) with petitioner "on a number of occasions," discussion whether to solve the problem with capital expenditures, budget, or additional financing, that he discussed the problem with Lowell Smith, and that in August or September he told petitioner "we had an over-advance from General Electric." The prosecution very carefully refrained from making any further inquiry of this witness concerning the extent of petitioner's knowledge of this "over-advance," but on cross-examination, he testified that in his August or September conversation with petitioner he did not explain to him the circumstances or how it was accomplished. His exact words were:

> "No, no, because—well, you know, it was sort of vague to me to some extent how exactly it was being handled and I told Mr. West we were in an over-position and that was basically the end of the conversation" (Tr. 1567).

When the witness received a call from GECC, to his home on December 13, he reported this to Mr. West who instructed him to make full disclosure to GECC immediately, an action not only completely consistent with lack of prior guilty knowledge, but inconsistent with possession of such knowledge.

IV.

THE JUDGMENT AND FINDINGS OF THE COURT ARE INCONSISTENT AND THEREFORE CONTRARY TO LAW.

In *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960), Judge Friendly, in discussing inconsistent verdicts, and contrasting jury verdicts with those in cases tried to a judge alone, pointed out that juries have "the power to bring in a verdict in the teeth of both law and facts" and that their inconsistencies are of no legal consequence. But as to judgments of a court sitting without a jury, the Court stated (at page 903):

> "None of these considerations is fairly applicable to the trial of a criminal case before a judge. There is no 'arbitral' element in such a trial. While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country,' even when he sits in the jury's place. If he deems an indictment multiplicious, he has only to say so, and the time for him to exercise any 'lenity' that he deems warranted is on sentence. There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method for resolving doubts. In civil cases inconsistencies in the findings of a judge are not tolerated, see *White* v. *State*, 1940, 260 App.Div. 413, 23 N.Y.S.2d 526, and inconsistencies even in jury verdicts may call for corrective action. Fed.R.Civ.Proc. 49(b), 28 U.S.C.; *Stetson* v. *Stindt*, 3 Cir., 1922, 279 F. 209, 23 A.L.R. 302; *Hartman* v. *White Motor Co.*, D.C.W.D. Mich. 1952, 12 F.R.D. 328. We do not believe we would enhance respect for law or for the courts by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of

> criminal charges that, for historic reasons, has been granted the jury. *United States* v. *Dotterweich*, 1943, 320 U.S. 277, 279, 64 S.Ct. 134, 88 L.Ed. 48. We know the role of logic in law is not unlimited; but 'Holmes did not tell us that logic is to be ignored when experience is silent.' Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail."

The Appellate Court in its opinion (Appendix A) declined to follow *Maybury*, reasoning that consistency between the verdicts on a multi-count indictment is unnecessary when a defendant is convicted on one or more counts but acquitted on the remainder, citing *Dunn* v. *United States*, 284 U.S. 390, 52 S.Ct. 189 (1932), as authority. The *Dunn* case, however, was a jury case in which Mr. Justice Holmes indicated that consistency in the verdict is not necessary and that whether the verdict may have been the result of compromise by the jury was possible but not subject to the court's inquiry. Such leniency is not applicable to a bench trial and the *Dunn* decision neither overrules nor is contrary to *Maybury*.

The judgment of acquittal as to the conspiracy count (105) is inconsistent with the judgment of guilty on certain counts necessarily results from even a summary examination of this assertion.

According to the trial judge's Memorandum, the initially innocent retention of funds due to GECC "gradually escalated into a scheme to defraud." This alleged scheme was purportedly put into operation both through the individual actions of the petitioner (and co-defendant Robert E. Lee) and their concerted action.

We are here confronted with a case wherein circumstantial evidence was of paramount importance. Indeed, as demonstrated above, there was a striking absence of evidence that petitioner ordered even one act in furtherance of the alleged scheme. This is borne out by the statement of the trial judge "that there is considerable exculpatory evidence on the issue of intent to defraud, and even the evidence against the appellants is subject to varying interpretations." This statement, no doubt, stems in large part due to the fact that a majority of the evidence actually adduced at trial against the petitioner arose from meetings at which he was merely one of a number of participants.

It is petitioner's contention that the nature of the evidence is such that a conspiracy was essential for the evidence to be sufficient as to the conviction of the substantive offenses. The chain of evidence which links him to the diversion is tenuous at best. That a conspiracy may have existed would be the only manner in which that chain of proof could withstand close scrutiny. For instance, the District Court states that Mr. Taphorn would indicate how much had been diverted and would request the appellant to order the conversion of liquid assets into cash by the end of the month. This aptly demonstrates that the alleged substantive violations, whether actually committed or not, could only be sustained if premised upon a conspiracy between the petitioner and unindicted co-conspirators. A finding that no conspiracy existed removes all possible supportive grounds for the substantive violations. As such, the judgment of acquittal as to this conspiracy charge is repugnant to the substantive violations of which petitioner was convicted.

CONCLUSION

For the reasons stated petitioner respectfully prays that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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March, 1977

CERTIFICATE OF SERVICE

I, James P. Linn, a member of the Bar of the Supreme Court of the United States and counsel of record for the Petitioner, Frank R. West, hereby certify that on the ..... day of ....., 1977, pursuant to the Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the following parties,

Daniel E. Wherry
United States Attorney
215 North 17th Street
Omaha, Nebraska 68102

by depositing said copies in the United States Mail, properly addressed and postage fully prepaid, this ..... day of ....., 1977.

All parties required to be served have been served.

.....

James P. Linn
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Robinson at Robert S. Kerr
Oklahoma City, Oklahoma 73102

Attorney for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1410

United States of America,

Appellee,

v.

Frank R. West,

Appellant.

No. 76-1411

United States of America,

Appellee,

v.

American Beef Packers, Inc.,

Appellant.

Appeal from the United States District Court for the District of Nebraska

Submitted: December 13, 1976

Filed: February 10, 1977

Before MATTHES, Senior Circuit Judge, STEPHENSON and WEBSTER, Circuit Judges.

MATTHES, Senior Circuit Judge.

This prosecution is premised on a 105-count indictment filed on August 8, 1975, in the United States District Court for the District of Nebraska. The original named defendants were Frank R. West, Robert E. Lee, American Beef Packers, Inc. (APB), and Beefland International, Inc. (BI). Forty-three counts of the indictment alleged that the defendants used or caused to be used the mails in furtherance of an alleged scheme or artifice to defraud, in violation of 18 U.S.C. § 1341; thirty-two counts charged the use of wire communications (telephone) to further the scheme, in violation of 18 U.S.C. § 1343; twenty-nine counts charged transportation of livestock in interstate commerce knowing the same to have been obtained through fraudulent means, in violation of 18 U.S.C. § 2314; and one count, No. 105, alleged that defendants West and Lee conspired with each other and with other named individuals to violate 18 U.S.C. §§ 1341, 1343 and 2314, all in violation of 18 U.S.C. § 371.

As is typical of prosecutions involving a scheme to defraud, and use of the mails, wire communications and interstate transportation of property in furtherance of the scheme, the indictment was complex; it alleged that the defendants, aided and abetted by each other, devised a scheme and artifice to fraudulently obtain cattle, hogs, money, and other items of value in excess of $20,000,000[1] from a large number of persons, firms, partnerships, co-operatives and corporations in different states.

Early in the case the district court granted defendants' waiver of a jury trial.

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[1] The first 10½ pages of the indictment detailed the acts and activities of defendants which comprised the scheme and artifice to defraud. The attempt to defraud General Electric Credit Corporation (GECC), more fully discussed below, constituted a substantial part of the scheme. The attempt to defraud cattle and hog feeders and producers constituted another substantial part of the scheme. Attached to the indictment as Exhibit A is a list of accounts payable for livestock allegedly purchased by the defendants. The number is staggering, as shown by the following summary of accounts payable to cattle and hog feeders and producers in thirteen states, taken from Exhibit A of the indictment:

State	Number Of Accounts Payable	Range Of Amounts Owing To Livestock Feeders And Producers			
California	1				$ 20,550.68
Colorado	53	from	$ 26.90	to	271,742.76
Indiana	1				26,785.84
Iowa	714	from	13.07	to	118,997.28
Kansas	52	from	20.00	to	159,647.82
Missouri	38	from	39.42	to	55,137.82
Minnesota	1				55,813.21
Nebraska	267	from	14.00	to	573,717.13
New Mexico	2	from	1,133.74	to	31,016.96
Oklahoma	11	from	231.02	to	271,270.81
South Dakota	21	from	31.13	to	259,217.94
Texas	41	from	100.00	to	415,469.35
Wyoming	2	from	8,413.93	to	150,348.76

Following extensive discovery proceedings, the trial commenced before the Honorable Robert V. Denney on October 14, 1975 and continued with only necessary interruptions for fourteen days. Approximately sixty-four witnesses testified, sixty for the government and four for the defendants. In an effort to shorten the trial, the parties stipulated to the substance of the testimony of a number of government witnesses who were not called to testify.[2]

At the close of the government's case, the court dismissed Counts 32, 33, 34, 35, 49, 51, 57, 58, 62, 63, 66 and 68 upon the government's motion because there was not sufficient evidence "adduced to sustain these particular counts."

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[2] It is thus understandable that a voluminous record was compiled. In addition to approximately 203 exhibits which were received into evidence, 31 volumes of pretrial and trial proceedings were recorded. We have carefully read and considered all of the pretrial proceedings, the testimony, a number of exhibits and pertinent parts of the two volumes of pleadings.

In response to motions of all of the defendants to dismiss all counts the court then dismissed the indictment against defendant Lee because of insufficient evidence.

At the close of all the evidence, the court upon renewed motions of the remaining defendants dismissed all counts of the indictment against BI because "it is a wholly-owned subsidiary of American Beef Packers, Inc., and American Beef Packers, Inc. is the true defendant in this case." Tr., Vol. 25, at 2094. The court simultaneously dismissed the indictment as to West on Counts "1 through 15, inclusive, relating to the bounced checks and DTC's, and Counts 16 to 74, inclusive, relating to purchase of cattle, Counts 83 and 98, letters with bankruptcy order, Counts 102 to 104 relating to goods in warehouse, and Count 105, conspiracy . . ." because of insufficient evidence on these counts. Tr., Vol. 25, at 2094. The court dismissed the indictment as to ABP on "Counts 1 to 15 relating to bounced checks and DTC's . . . , Counts 16 to 40 and 48 to 70 on purchase of cattle . . . ; Counts 83 and 98, letters of bankruptcy order . . . , Counts 102 to 104 relating to goods in warehouse, and Count 105 as to conspiracy . . .". Tr., Vol. 25, at 2095.

Thereafter, the court filed an exhaustive opinion, *United States* v. *West*, 407 F.Supp. 1148 (D.Neb. 1976), and entered two judgments, one finding West guilty as to Counts 75 through 81, 84 through 97, 100 and 101, and not guilty as to Count 82. In the other judgment the court found ABP guilty as to Counts 43 through 46 (relating to purchase of Chapman cattle, discussed *infra*), 71 through 81, 84 through 97, and 99 through 101, and not guilty as to Counts 41 and 42, 47 and 82. The court dismissed all of the remaining counts, including all counts relating to the purchase of livestock from all feeders and producers except Chapman. The court sentenced West to two years imprisonment on each count with the sentences to run concurrently, and assessed a fine of $1,000 on each count. West was also directed to pay one-half of the costs of prosecution. However, the court

suspended execution of the sentence of imprisonment and placed West on probation for a period of two years.

ABP was fined $100 on each count and directed to pay one-half of the costs of prosecution.

West and ABP, represented by different counsel, filed notices of appeal, filed briefs in this court, and presented separate arguments.

I

The district court's detailed findings of fact obviate the necessity of another full description of the various and sundry activities and machinations of appellants which ultimately resulted in the virtual termination of ABP's principal source of financial aid and led to appellants' encounter with the law. A brief summary of the facts is necessary, however, for a full understanding of the principal issue presented by this appeal: whether the evidence was sufficient to warrant the finding that appellants devised a scheme or artifice to defraud their creditors, particularly GECC.

The indictment alleged that the scheme to defraud had its inception "from on or about the first day of June, 1974." A considerable part of the indictment delineated the participation by appellants, as well as the two dismissed defendants, in setting up the financing arrangement between ABP and GECC. The history of ABP's financing arrangements, particularly as it related to GECC, is explored at length by the district court, 407 F.Supp. at 1149-50. ABP's large-scale operations required a substantial amount of capital. A credit agreement between ABP and GECC, which enabled ABP to acquire virtually all of its working capital from GECC, was entered into on June 28, 1972. 407 F.Supp. at 1149. Under this agreement, GECC extended a $41,000,000 revolving line of credit secured by accounts receivable of ABP, and a $13,000,000 long-term loan secured by other property such as deeds of trust or

mortgages on real estate. As ABP's business expanded, it was troubled by a lack of funds to operate on a sound fiscal basis, particularly a lack of sufficient funds to pay for the large quantities of livestock purchased daily by ABP from cattle dealers. This led to the diversion of funds due ABP from the lock boxes controlled by GECC, described in the district court's opinion, 407 F.Supp. at 1149-51. Checks due from ABP's customers customarily sent to GECC via the lock boxes were, at the specific directions of ABP's key officers in charge of the finance department, forwarded directly to ABP, which, in turn, used the funds in its operations. Funds wrongfully diverted amounted to approximately $6,000,000 on occasions between June 1974 and December 13, 1974, the date when GECC learned of the diversions. The events that ensued after December 13 are reviewed in the district court's opinion, 407 F.Supp. at 1152-57. As found by the court and as shown by the record, ABP filed a Chapter XI bankruptcy petition on January 7, 1975.[3]

In assessing the sufficiency of the evidence, we view the evidence in the light most favorable to the government, and afford the government the benefit of all reasonable inferences to be drawn from the evidence. *See Glasser* v. *United States*, 315 U.S. 60 at 80 (1942); *United States* v. *Pilla*, ... F.2d ..... (8th Cir., Jan. 5, 1977); *United States* v. *Whiting*, 538 F.2d 220, 223 (8th Cir. 1976); *United States* v. *Swanson*, 509 F.2d 1205 (8th Cir. 1975). Factual findings of the district court relating to matters other than the ultimate question of guilt must stand unless such findings are clearly erroneous. *See Campbell* v. *United States*, 373 U.S. 487, 493 (1963); *Kilcrease* v. *United States*, 457 F.2d 1328, 1331 (8th Cir. 1972). We conclude from our study of the voluminous record that the evidence was clearly sufficient.

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[3] The record shows that ABP has been authorized to continue to operate its business under the jurisdiction of the bankruptcy court.

A

Claim that there was no proof of intent to defraud

Appellants first challenge the sufficiency of the evidence to establish intent to defraud. Appellants concede that accounts receivable were in fact diverted. They argue, however, that the diversions were not accomplished as the result of a scheme or artifice to defraud within the meaning of 18 U.S.C. §§ 1341 and 1343, but rather that at most they constituted a breach of contract which would possibly subject appellants to civil liability.

With respect to the question of whether there was the requisite intent to establish criminal responsibility, Judge Denney concluded:

> This case . . . goes far beyond willful breach of contract for which ABP could be liable for punitive damages. It is the intentional, deliberate, and planned concealment of the breach of contract that justifies the imposition of criminal sanctions. *United States* v. *George*, 477 F.2d 508 (7 Cir. 1973); *Epstein* v. *United States*, 174 F.2d 754 (6 Cir. 1949). *Epstein, supra,* is highly instructive as it distinguishes "active" as opposed to "constructive" fraud, and calls for the imposition of criminal sanctions only in cases of active fraud.
>
> "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive. [Citations omitted]. . . . Constructive fraud is a breach of legal or equitable duty which in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests." *Id.* at 765-766.

407 F.Supp. at 1159-60.

The district court, after describing the actions of West and ABP in breaching the contract with GECC and thereafter concealing the breach, held that

> These facts and reasons convince the Court, beyond a reasonable doubt, that both Frank R. West and American Beef Packers devised a scheme or artifice to defraud GECC by means of false or fraudulent representations; and that Frank R. West and American Beef Packers acted with the specific intent to carry out some essential step in the execution of the scheme or artifice to defraud.

407 F.Supp. at 1161.

The district court's summary of the actions of West and ABP in effecting and concealing the breach of contract is fully supported by the record. Our independent review of the evidence satisfies us that the district court's finding as to intent to defraud is supported by sufficient evidence, and that its conclusion was not induced by a misconception of the applicable law.

Related to appellants' contention that there was insufficient evidence of intent to defraud is their allegation that GECC was fully aware of the diversions from the outset and that such knowledge was fatal to the existence of the claimed fraudulent scheme. One of appellants' key contentions is that, once the diversions began, ABP began depositing funds payable to GECC in a certain bank account in much larger amounts than had previously been the case, and that the amount of such deposits put GECC on notice that the source of such deposits had to be accounts receivable improperly diverted by ABP.

Certain factual background is necessary for an understanding of appellants' contention. Pursuant to a mutual understanding between ABP and GECC, a lock box had been established at the Omaha National Bank for funds due GECC on accounts receivable. The establishment of this

lock box was in part necessitated by the fact that some customers failed to send their remittances to the appropriate lock box, instead sending payment directly to ABP. Amounts received by ABP in such manner were to be immediately deposited by ABP in the Omaha National Bank lock box. After the diversions began, whenever ABP was ready to pay back the wrongfully withheld funds, it would do so by transferring the diverted funds from its bank account at the Northwestern National Bank of Omaha to the Omaha National Bank lock box.

Appellants' contention is troublesome; however, after a review of the evidence, we are persuaded that the government established sufficient evidence to explain the reasonableness of GECC's lack of knowledge in the face of these facts. The evidence and reasonable inferences therefrom establish that ABP adopted a practice designed to shield its manipulations of the accounts receivable. An ABP employee, whose duty was to deposit checks received from customers in the appropriate account, was instructed by her superior to, in effect, keep two sets of records and not show GECC auditors copies of deposit slips reflecting deposits in ABP's Northwestern National Bank account. Additionally, there was evidence and the district court found that false financial statements were sent to GECC which had the effect of lulling the latter into believing that ABP was adhering to the lending agreement insofar as it related to accounts receivable. These practices were not consistent with fair dealing, were contrary to the terms of the lending agreement, and militate against appellants' theory of knowledge by GECC.

Finally, in addition to the evidence reflecting that ABP actively sought to disguise its activities, the government also introduced evidence that, when a transfer of funds was made from the Northwestern National Bank to the Omaha National Bank, ABP would inform GECC that a number of receivables had come in and would inform it as

to which accounts were paid. However, the Chicago office of GECC, which monitored the status of the ABP accounts, was given only the gross amount that had been put into the bank. The actual statement of deposits went to the GECC treasury office in Stamford, Connecticut, which had no reason to question the amounts received. While GECC employees might have been able to discover the diversions had they been more vigilant, in view of the overwhelming evidence setting out appellants' sophisticated methods of disguising their activities, we find the evidence that GECC lacked knowledge of the scheme to be convincing.

B

West's claim of lack of knowledge

West alleges that the evidence was insufficient to show that he had knowledge of the scheme. We disagree. There was substantial direct evidence that West had actual knowledge of the wrongful diversions. James A. Taphorn, vice-president of finance of ABP, testified that the diversions of accounts receivable occurred at least twenty times during his tenure, that he discussed the diversions with West on from six to twelve occasions, and that he finally resigned in June 1974 because of his inability to obtain the large amounts of cash essential to the successful operations of ABP. Taphorn specifically testified that prior to June 1974 he told West:

> Well, basically that we were into GECC for a couple of million bucks and we got to get them paid back.

Tr., Vol. 9, at 783.

Tom Clark, who succeeded Taphorn, testified under a grant of immunity that he learned of the diversions in August or September, 1974 and that he discussed the matter with West on numerous occasions. Clark stated: "We are on a treadmill." Tr., Vol. 18, at 1542.

Although West denied actual knowledge of the diversion scheme, the district judge, in the exercise of his prerogative, declined to credit West's testimony and pointed out that some of West's testimony indicated knowledge on his part. 407 F.Supp. at 1160. Moreover, West was the president, principal stockholder and general manager of ABP. He received an annual salary of $150,000 prior to and at the time the Chapter XI bankruptcy petition was filed. It would strain credulity and defy logic to conclude that the key officer of a corporation would not be generally familiar with the financial affairs of the company and keep himself informed of its practices in obtaining funds necessary to operate business on a day-to-day basis. The district court properly considered the circumstance of West's position in the corporation in deciding the question of knowledge. 407 F.Supp. at 1160-61.

II

ABP contends that it "was not convicted of the scheme or artifice to defraud alleged in the indictment," and that consequently the judgment finding it guilty cannot stand. Much is said in ABP's brief in an attempt to persuade us to rule favorably on this claim of prejudicial error. Stripped of all nonessential verbiage, the argument amounts to nothing more than a claim of a fatal variance between the indictment and the evidence. ABP contends that the indictment in reality charged two schemes—one to defraud GECC through the wrongful diversion of accounts receivable, and the other to defraud numerous other creditors of ABP by collecting money and assets with the intention of going into bankruptcy. Because ABP was found guilty of only those counts relating to the scheme to defraud GECC and those relating to the Chapman cattle discussed more fully *infra*, it is asserted that there was a fatal variance.

Viewing the record in the light of firmly established principles, we conclude that this contention should be rejected.

It is well established that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), *citing Ex Parte Bain*, 121 U.S. 1 (1887). Whether the defendant has been required to defend a charge not made against him must of necessity be determined by consideration of the whole record. More than fifty years ago this court considered the question of fatal variance in *Mathews* v. *United States*, 15 F.2d 139 (8th Cir. 1926). There, the court stated:

> Variance is a difference or disagreement between the essential parts of a legal proceeding, that to be effectual must agree with each other. In its common form in criminal procedure it is a disagreement between the allegations of the indictment and the proof. This disagreement must be in some matter which in point of law is essential to the charge. (Citations omitted.)
>
> Tests of fatal variance are: Was defendant misled? Will defendant be protected against a future proceeding? (Citations omitted.) "Upon the question of variance between indictment and proofs, the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his injury."

15 F.2d at 142-43.

The substance of the holding in *Mathews* was restated by this court in *United States* v. *Schrenzel*, 462 F.2d 765, 769 (8th Cir.), *cert. denied*, 409 U.S. 984 (1972):

> [T]he "true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935).

We agree with the government that ABP's variance argument is tantamount to an assertion that it was necessary to prove each and every element of the alleged scheme. It is settled doctrine, however, that the government is not required to prove all the elements. "A scheme to defraud is necessarily made up of numerous elements. No particular element need be proved if sufficient is shown to constitute the scheme to defraud." *Baker* v. *United States*, 115 F.2d 533 at 542 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941), *quoting Cowl* v. *United States*, 35 F.2d 794 798 (8th Cir. 1929); *Schaefer* v. *United States*, 265 F.2d 750, 753-54 (8th Cir.), *cert. denied*, 361 U.S. 844 (1959); *Holmes* v. *United States*, 134 F.2d 125, 133 (8th Cir.), *cert. denied*, 319 U.S. 776 (1943). As Judge Coffin aptly observed in *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036 (1969):

> Viewing the record as a whole, we can only conclude that the process complained of appears to have been little more than a whittling down of the prosecution's weapons. Of the twenty substantive paragraphs in Count I, incorporated in all other counts by reference, eleven were struck in whole and five in part. Only four remained intact. And, as a consequence of this, of the several theories of fraud alleged by the Grand Jury only one reached the trial jury. We think appellants' right to be informed of the nature of the charge against them was adequately protected. *Id.* at 65.

Here, the indictment unequivocally alleged the segments of the scheme of which ABP was convicted. It was bound to know from the indictment and the bill of particulars that appellants were charged with devising a scheme to defraud ABP's creditors, including GECC, and with using

the mails and wires to further and carry out the scheme. The district court concluded that the evidence was insufficient to prove appellants' guilt beyond a reasonable doubt on a number of the counts. But such action does not constitute a fatal variance between the indictment and the proof. Indeed, we fail to perceive any prejudice to appellants resulting from their acquittal on a substantial number of counts which were related solely to certain segments of the scheme to defraud. *See* F.R.Cr.P. 52.

III

We also reject appellant West's contention that the findings and judgments of the court are inconsistent, contrary to law, and that a reversal is therefore required.[4] West's argument, to the extent that it is independent of his contention that the evidence was insufficient to sustain his conviction,[5] is that a finding of no conspiracy mandates a finding of not guilty of the substantive counts. He relies upon *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960), where, under the facts presented, Judges Friendly and Lumbard were of the view that in a judge-tried case, the rule generally allowing inconsistencies in a jury verdict should not prevail. But, *cf. United States* v. *Dovico*, 329 F.2d 52 (2d Cir. 1964); *United States* v. *Robinson*, 320 F.2d 880 (2d Cir. 1963).

We reject West's claim. As we have recently pointed out in *United States* v. *Donahue*, 539 F.2d 1131 (8th Cir. 1976):

> In *Isaacs* v. *United States*, 301 F.2d 706, 725 (8th Cir.), *cert. denied*, 371 U.S. 818, 83 S.Ct. 32, 9 L.Ed.2d 58 (1962), this court said that the substantive offenses proscribed by the mail fraud and wire fraud statutes are closely related to the offense of conspiracy described in 18 U.S.C. § 371. There are, however, differences between a substantive violation of one of the statutes in question and a conspiracy to violate it.

539 F.2d at 1135.

The fact that the court found appellant West guilty of certain of the substantive counts but not of the conspiracy count does not mean necessarily that the verdicts are inconsistent, as West appears to contend.

Further, assuming *arguendo* that the verdicts were inconsistent, we decline to follow *Maybury*, but adhere to the general rule that consistency between the verdicts on a multiple-count indictment is unnecessary when a defendant is convicted on one or more counts but acquitted on the remainder. *Dunn* v. *United States*, 384 U.S. 390 (1932); *Batsell* v. *United States*, 403 F.2d 395, 400 (8th Cir. 1968); *cert. denied*, 393 U.S. 1094 (1969); *McElheny* v. *United States*, 146 F.2d 932 (9th Cir. 1944); Annot. 18 ALR 3d 274 (1968).

IV

Appellants lodge an attack against the indictment, asserting it was rendered invalid by unconstitutional acts and proceedings. A review of the history of the indictment discloses the basis for this issue.

Motions were filed to quash the indictment. In an accompanying affidavit, an attorney for ABP stated, on information and belief, that a grand jury impaneled on December 12, 1973, had heard testimony of more than fifty witnesses; that the grand jury was discharged on June 12, 1975, without "handing down" an indictment; that a second grand jury was impaneled on August 5, 1975; and that on August 8, 1975, it returned the indictment which is the subject of appellants' attack. The allegations in the affidavit

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[4] Appellant ABP also alleges that the verdict finding it guilty as to Counts 43-46 is inconsistent with the verdict finding it not guilty of those counts alleging a scheme to defraud the other livestock feeders and producers. Because we reverse as to those counts, we need not consider ABP's allegation.

[5] We have already rejected this sufficiency of the evidence claim in Part I, *infra*.

focused upon the fact that the second grand jury did not hear the testimony of witnesses who had personal knowledge of the events alleged to be constituent elements of the scheme or artifice to defraud.

Appellants' position may be summarized as follows: (1) since the first grand jury failed to indict after hearing numerous witnesses over a span of nearly two months, the subject indictment is invalid because the second grand jury deliberated only three days before returning the indictment and appellants were thus denied their right to a full investigation by the grand jury of each of the separate charges of the indictment; and (2) the indictment was improperly based on excessive use of hearsay. Appellants assert that the indictment deprived them of their constitutional right to be tried on a lawful indictment and likewise denied them due process of law.

After an *in camera* hearing, the court determined that the indictment was valid and, accordingly, denied the motions to quash. We hold that appellants have not sustained their burden of showing the indictment was invalid.

Initially we point out that there is a strong presumption of regularity accorded to the findings of grand juries. *See Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 39 (8th Cir. 1963). An indictment regular on its face, returned by a legally constituted grand jury, is presumed to be founded on competent evidence and a heavy burden is placed on one who seeks to overcome the presumption. *Martin* v. *United States*, 335 F.2d 945, 949 (9th Cir. 1964); *Cochran* v. *United States*, 310 F.2d 585, 590 (8th Cir. 1962); *Blumenfield* v. *United States*, 284 F.2d 46, 50 (8th Cir. 1960). Moreover, an indictment based solely on hearsay evidence does not violate the provisions of the fifth amendment. *See Costello* v. *United States*, 350 U.S. 359 (1956);[6] *United States* v.

[6] ABP concedes in its brief that there is no "constitutional" limitation to prohibit an indictment based upon hearsay testimony of government witnesses. It cites cases from several circuits holding that the excessive

Akin, 464 F.2d 7, 8 (8th Cir.), *cert. denied*, 409 U.S. 981 (1972). Finally, we note that the fact that the first grand jury failed to indict appellants is not in and of itself legally significant. *United States* v. *Gross*, 416 F.2d 1205, 1210 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970) (failure by two previous grand juries to indict did not bar later indictment by third grand jury).

In our view the evidence submitted in support of the motions to quash was not adequate to bring this case within the narrow and limited situations in which a defendant may successfully attack the indictment.[7] The affidavit accompanying the motions to quash did not contain allegations that the jury was illegally constituted; that the indictment was invalid on its face; that the indictment was obtained as a result of prosecutorial misconduct, *see United States* v. *Gallo*, 394 F.Supp. 310 (D.Conn. 1975); or that the trial court amended the original indictment so as to permit appellants to be tried on different charges, *see Stirone* v. *United States*, 361 U.S. 212 (1960).

The record of the *in camera* proceedings discussed previously further supports our conclusions. At the hearing the district judge diligently inquired into the proceedings of both grand juries, particularly the second one. The transcript of the testimony in the *in camera* hearing was sealed

[6] (Continued)—
use of hearsay testimony tends to destroy the important role of the grand jury and suggests that we apply that rule to this case. We find no basis for applying that rule here and decline the invitation.

[7] In resisting the motions to quash, the United States Attorney insists, as he did in the district court, that the supporting affidavit, being based solely on "information and belief," does not constitute the quantum of proof required to sustain the burden cast upon the movant as enunciated in the cases cited *supra*. There is precedent to sustain the government's position. *See Smith* v. *State of Mississippi*, 162 U.S. 592, 600 (1896); *Kastel* v. *United States*, 23 F.2d 156, 158 (2d Cir. 1927], *cert. denied*, 277 U.S. 604 (1928) (affidavit based solely on information and belief not sufficient).

and forwarded to this court. Our examination of the transcript persuades us that neither the United States Attorney nor his assistant, both of whom testified under oath, pressured the grand jury for an indictment and that no deception or misrepresentations were made to induce the grand jury to act. The transcript shows that three government employees who had made an extensive investigation testified before the second grand jury as to every count in the indictment, that copies of the "majority" of the documentary evidence were available to the second grand jury, and that the second grand jury was informed that the first grand jury had heard evidence and had not returned an indictment. The court was informed during the hearing that no indictment was presented to the first grand jury because the investigation was incomplete and the term of the first grand jury expired on June 9 before the United States Attorney's Office had adequate time to prepare the lengthy indictment.

We agree with the district court that the presentation to the second grand jury was proper.

V

ABP also complains that counsel for appellants were improperly denied an opportunity to participate in the *in camera* proceeding. ABP is apparently of the view that the district court should have conducted a plenary adversary inquiry into the deliberations of the second grand jury. We are satisfied, however, that in the absence of reasons more compelling than those presented by this record, the district court was not required to permit appellants to launch an adversary excursion into the proceedings of the second grand jury. The reason for the rule was stated by the Supreme Court in *Costello* v. *United States, supra*:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before a trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 363.

Finding that the appellants were not prejudiced by lack of an adversary hearing, we hold that their complaint does not require or warrant us to interfere with the course pursued in conducting the *in camera* hearing.

VI

Finally, ABP contends that the district court should have acquitted it of Counts 43 through 46, which concern the Chapman cattle. As noted in the introductory part of this opinion, the indictment charged that West, ABP, and the other two defendants devised a scheme intended to defraud numerous persons, firms and corporations, including cattle feeders, of their property. Counts 41 through 47 are based upon that part of the scheme relating to cattle procured from one William M. Chapman. Count 41 charged interstate transportation of the cattle in violation of 18 U.S.C. § 2314. Counts 42 through 47 charged use of wire communications (telephone) in interstate commerce in violation of 18 U.S.C. § 1343.

Judge Denney's extensive findings delineate the events relating to Counts 41 through 47. 407 F.Supp. at 1157-58. The court ruled that the evidence on Counts 41 and 42 was "equally balanced" and accordingly dismissed those counts. 407 F.Supp. at 1165. The court also held that:

> As to Count 47, [an interstate telephone conversation on January 8, 1975] the Court has carefully considered the principles enunciated in *United States* v. *Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed. 2d 603 (1974) and concludes that a judgment of acquittal is required as to this count. The telephone call charged in Count 47 occurred after the petition for bankruptcy was filed, and furthermore there is no evidence that Mr. Chapman's cattle were still at Fort Morgan when the call was made. It is, therefore, quite possible that the scheme to defraud Mr. Chapman was completed at the time of the call and that the call was not essential to the fruition of the scheme.

407 F.Supp. at 1165.

The court determined, however, that the interstate calls alleged in Counts 43, 44, 45 and 46 were essential steps in furtherance of the scheme to defraud, and accordingly found ABP guilty as charged "in Counts 43, 44 and 45." *Id.*[8]

We disagree with the court's disposition of Counts 43 through 46 and reverse, with directions, as to those counts. We conclude that these counts, like Count 47, are controlled by *United States* v. *Maze*, 414 U.S. 395 (1974). The scheme to defraud as charged in the indictment reached fruition when ABP gained physical possession on January 6 of the Chapman cattle through fraudulent means. Therefore, the calls on which Counts 43 through 46 are based were not, in our considered view, made in furtherance of the scheme.[9]

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[8] Evidently the failure to include Count 46 in its finding of guilt was an oversight. The formal judgment of guilt does include Count 46 and it is so treated by ABP and the government in their briefs.

[9] Since the district court dismissed Counts 41, 42 and 47, the net result of our decision is the dismissal of that part of the indictment alleging a scheme to defraud Chapman.

VII

In conclusion, we have carefully considered all issues raised in these appeals. The record attests to the meticulous efforts of the trial judge to afford all parties a full and fair opportunity to present their respective positions in what proved to be an extremely complicated case. The result reached by the trial judge with the one exception, demonstrates discerning judgment on his part in the disposition of the case.[10]

The judgment as to West is affirmed. The judgment of conviction on Counts 43, 44, 45 and 46 as to appellant ABP is reversed and remanded with directions to dismiss those counts. In all other respects the judgment as to ABP is affirmed. Costs shall be divided equally between the appellants.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[10] It is interesting to note that the attorney who did not represent West in the trial, but apparently was employed thereafter, made this observation in connection with the hearing on the motion for new trial:

> Judge, I have read the thing [record] and people in our office have read it, and I have never seen a better conducted trial. The lawyers were prepared and obviously you were prepared, and the only thing we disagree with was your verdict.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	CRIM. NO. 75-0-87
	)	
Plaintiff,	)	
vs	)	MEMORANDUM
	)	
FRANK R. WEST and AMERICAN BEEF PACKERS, INC.,	)	
	)	
	)	
Defendants.	)	

APPEARANCES: For Plaintiff - Daniel E. Wherry,
United States Attorney,
District of Nebraska

Michael L. Schleich,
Asst. United States
Attorney,
District of Nebraska

For Defendant, Arthur D. O'Leary,
Frank R. West - of Omaha, Nebraska

For Defendant,
American Beef Lyle E. Strom,
Packers - of Omaha, Nebraska

DENNEY, District Judge

This matter comes before the Court for decision subsequent to trial and the submission by the parties of final argument in written form.

American Beef Packers was once the second largest packinghouse and the 218th largest corporation in America. In the fiscal year ending July, 1974, it had sales of $896,-

904,000, net earnings of $4,861,000 ($2.50/share), over 3000 employees, and slaughtered 1,483,100 cattle and 564,000 hogs. Six months later, it filed for Chapter XI bankruptcy.

On August 8, 1975, American Beef Packers, Inc., Frank R. West, Robert E. Lee, and Beefland International, Inc. were named in a 105 count indictment alleging violations of 18 U.S.C. §§ 1341, 1343, 2314, 371 and 2. The gist of the indictment is that the defendants devised and executed a scheme or artifice to defraud cattle feeders and creditors of money or property valued in excess of 20 million dollars. At the close of the plaintiff's case, the Court granted the motion of Robert E. Lee to dismiss on the grounds of insufficient evidence. Beefland International was dismissed as a defendant at the close of all the evidence, on the grounds that it was a wholly owned subsidiary of American Beef Packers and that, as such, its inclusion was duplicitous. As against Frank R. West, the Court dismissed all counts except those [Counts 75 through 82, inclusive; 84 through 97, inclusive; and 99 through 101, inclusive] relating to the diversion of funds from the General Electric Credit Corporation [hereinafter GECC]; likewise, as against American Beef Packers [hereinafter ABP], the Court dismissed all counts except Counts 41 through 47, inclusive; 71 through 82, inclusive; 84 through 97, inclusive; and 99 through 101, inclusive, relating to the diversion of funds from GECC and the purchase of cattle from Chapman Cattle Company. Although not required to do so, the Court will discuss the facts and circumstances underlying all of the counts as charged in the indictment.

In accordance with F.R.Cr.P. 23(c), the Court makes the following findings of fact and conclusions of law.

ABP began in 1963, when the defendant, Frank R. West, and others, purchased Western Iowa Pork. Prior to that time, Mr. West had been engaged exclusively in the order buying business. Western Iowa Pork, a hog packinghouse located in Harlan, Iowa, was not initially successful

and Mr. West loaned the company money and took over its day to day operations until it became a going concern. American Beef Packers then opened a plant in Oakland, Iowa, in late 1966, and again Mr. West took over the day to day operations. A plant was opened in Omaha, Nebraska, in 1968, and, in 1972, Beefland International [hereinafter BI] was acquired.

GECC had been financing BI while James Talcott had been providing credit to ABP. However, when BI was acquired, ABP switched to GECC as its prime source of credit, and thereafter both BI and ABP credit lines were identical, consisting of an accounts receivable financing arrangement. This type of financing was necessary, due to the high sales volume and the fact that the practice in the industry was that cattle feeders were paid by check immediately upon delivery of the cattle, while purchasers of slaughtered carcasses typically did not pay the packinghouse until two weeks after delivery. Thus, almost three weeks would elapse from when ABP purchased a head of cattle until that head was paid for by the customer (e.g., a supermarket or wholesaler).

These credit agreements, signed on June 28, 1972 [Exhibits 203A and 204A], extended a 41 million dollar revolving line of credit secured by the accounts receivable of ABP and BI, and a 13 million dollar long term loan. The actual amount of the revolving loan varied, but was not to exceed an amount equal to 90% of "eligible receivables" plus 60% of inventory.

Eligible receivables were computed daily by taking receivables less than 30 days old, and making various adjustments based on the amounts received at various lockboxes that day, and the sales for that day. In the event that the updated figures indicated an increase in collateral, then GECC declared the amount by which 90% of eligible receivables plus 60% of inventory exceeded the loan balance, as "available." ABP could receive money under their loan,

on a daily basis, only to the extent such moneys were "available."

To insure collection, the loan agreements provided for "lockboxes," which were post office boxes in various cities. A bank in each city was authorized by ABP to pick up customer checks coming into the lockboxes and to deposit the checks in a GECC account in the bank.

When a customer's check was received at a lockbox, it was credited as a payment on ABP's loan, and simultaneously a like amount was taken off the receivables, thus reducing the collateral. Each morning, an employee of ABP (usually Lowell Smith) would call an employee of GECC (usually Louis Kovanda). These men would exchange figures on the sales of the preceding day and the lockbox receipts. In addition, Lowell Smith would compute the amounts needed at ABP's bank to cover checks written by ABP on those banks. ABP and GECC usually agreed on the amount that ABP was entitled to under the loan agreement, and by 3:00 P.M. Omaha time GECC would have wire transferred the funds to ABP's bank.

In the fall of 1974, ABP established checking accounts at banks distant from the livestock feeding areas of the midwest. This was done to take full advantage of mail delays that would postpone presentment of ABP checks, thereby giving ABP a few days before it was necessary to borrow money from GECC to cover the checks. The operation of these checking accounts is more fully explained subsequently in this Memorandum.

On several occasions, from December, 1973, through June, 1974, ABP diverted incoming checks that would normally have been deposited in lockbox accounts. This was accomplished by Mr. Lowell Smith or Herbert Schrader of ABP, who would call various customers of ABP and request that they send their checks to ABP offices instead of to the lockboxes. There were also a few customers who sent their

checks to ABP out of habit or inadvertence. For these few customers, GECC and ABP established a lockbox account in the Omaha National Bank. Under the terms of the loan agreement and the common understanding of the parties and their practices, *all* receivables were to be deposited into a lockbox account. [See ¶8, Exhibit B, as amended, of Exhibit 203A]. Thus, a diversion was accomplished by taking checks coming into ABP and depositing them into the Northwestern National Bank—using the money for 7 to 10 days and then wire transferring the money into the ONB lockbox account. In early 1974, the amount of the diversion would approach 3 million dollars but before June, 1974, ABP would always pay back the diversion (by wire transfer to the ONB lockbox account) before the end of the month.

Prior to June, 1974, Mr. Taphorn, then the financial vice-president of ABP, *discussed this practice with Frank West on numerous occasions*. Mr. Taphorn proposed various methods of increasing their operating cash by selling liquid assets (e.g. cattle on feed) and usually Mr. West would agree, and the diversion would be cleaned up temporarily.

Mr. Taphorn left ABP in June, 1974, because the company was in need of ever increasing amounts of cash, and he felt that as he was unable to raise the necessary funds, he should step aside. Tom Clark, formerly employed as a CPA by Arthur Anderson, Inc., was hired to replace Mr. Taphorn. Mr. Clark was no more successful than Mr. Taphorn in raising funds. ABP was in the process of constructing a large plant in Dumas, Texas. When construction began in the fall of 1973 on the Dumas plant, its estimated cost was 11 million dollars and ABP planned to finance it with 8.5 million dollars in long term money from GECC and the Economic Development Association, while the remainder was to be paid out of working capital. Dumas, however, began to cost more than anticipated. In June, 1974, expenditures on Dumas had escalated to 15 million dollars, of which 7 million dollars then had to be financed out of working capital. The costs continued to rise to a figure approaching

20 million dollars, yet the plant was still not completed by January, 1975.

Exhibit 411, a summary prepared by Eugene Peuterbaugh of the Packers and Stockyards Administration, demonstrates the extent of the diversion. In June, 1974, nine checks totalling $2,142,227 were diverted and used for an average of 34 days. July saw eleven checks totalling $1,316,388 being diverted for an average of 22 days. In August, 1974, twelve checks totalling $5,022,361 were diverted and used for an average of 20 days. As accounts more than 30 days old were dropped from the list of eligible receivables, there was no advantage to ABP in retaining a diverted check past the time the account was 30 days old. This fact is reflected in the figures for the subsequent months, showing an increased sophistication in the diversion. September saw eleven checks totalling $3,838,614 being diverted for an average of nine days. In October, 1974, the size and frequency of the diversion increased to such an extent that oftentimes groups of checks were deposited in the Northwest National Bank at the same time. Bookkeeping became a nightmare. Gail Keenan, an ABP employee, testified that she would prepare [Exhibit 402] deposit slips in duplicate and would make a copy of all diverted checks. These internal documents were necessary to keep track of the diversion and to eventually update the accounts receivable when the money was transferred back out of the Northwestern National Bank and into the lockbox account at the Omaha National Bank. Essentially, the normal business procedure of matching customer checks with invoices, then marking the invoices paid and removing them from the accounts receivable, was not performed when ABP received the checks—instead, copies of the checks were retained and the matching was done when the diverted funds were returned to the ONB. Mrs. Keenan was instructed by Lowell Smith not to show these documents to GECC auditors. She followed these orders and the GECC auditors, who performed monthly audits, as a result, never discovered the diversion.

Even with these documents, a thorough accounting of each customer check is very difficult as the totals the Court must work with typically represent a multitude of checks, thereby obfuscating the history of individual checks. As best the Court can determine, October, 1974, saw 16 separate checks totalling $2,583,871 diverted for an average of 10 days, as well as other deposits totalling $4,081,414, which were diverted for approximately 15 days. In November, 1974, five separate checks totalling $147,717, as well as other deposits totalling $2.527.536, were diverted. Some of this money was still in the Northwest National Bank when the diversion was discovered on December 16, 1974. December saw 127 separate checks totalling $5,109,141 diverted for an average of 12 days, and 74 of these were outstanding when the diversion was discovered. All of these December checks were diverted in the first half of December, as the diversion ceased operating on such a grand scale when GECC auditors descended on ABP shortly after December 16. At that time, the amount of the diversion stood at $3,513,508.00.

Of this multitude of checks spanning a period of 7 months, the defendants stand charged with 24 counts of mail and wire fraud relating to 24 specific checks, the evidence bearing on which the Court will discuss later in this Memorandum.

In October, 1974, Louis E. Kovanda of GECC met with Tom Clark at GECC offices, for the purpose of discussing a proposal made by GECC in June, 1974 [Exhibit 223A] that would increase ABP's line of credit from 54 million dollars to 93 million dollars (80 million of which would be available for a revolving loan) and would provide for "colending" banks. This expanded line of credit was contemplated by the parties as a method of financing the additional accounts receivable that would be generated when the Dumas plant became operational. Tom Clark was unsuccessful in attemping to obtain additional long term financing.

The prior agreement was not financed totally by GECC; rather, there were "participating" banks which provided capital but could withdraw it on 60 days notice. GECC, due to its cost of administrating the loan, charged interest equivalent to the prime rate plus 3%, while the participating banks received a somewhat lower figure. GECC was not totally pleased with the "participating bank" system of financing, as GECC was concerned that the participating banks might withdraw their capital on short notice, thereby increasing GECC's risk of loss. The new agreement was to provide for "co-lending," whereby a bank supplying capital could not precipitously withdraw its capital.

At the October, 1974, meeting, Tom Clark was in general agreement with the GECC proposal, except for one provision that allowed GECC to have a man officed at ABP premises at all times. A compromise was reached where a GECC man would merely have unrestricted access to the ABP offices, but he would not be officed there.

A meeting was set for December 10, 1974, to further discuss the proposal with various banks which were interested in becoming co-lenders.

On October 24, 1974, Mr. Lowell Smith, of ABP, authorized the Wachovia Bank and Trust, in Winston-Salem, North Carolina, to set up 6 disbursement accounts and a finding account [Exhibit 244c]. The accounts were numerous because ABP wanted to keep separate accounts for each of its plants. When checks were written on one of the disbursement accounts, they would take some time (called a disbursement float) to reach Wachovia. When the day's checks were received, Mr. Christie of Wachovia would call Mr. Smith and tell Smith the amount needed in the funding account for that day. Mr. Smith would have GECC or ABP wire transfer into the funding account, after which Wachovia would make an internal transfer—leaving the accounts at zero balance—except for a compensating balance (approximately $50,000) that was always on deposit to compensate Wachovia for its services. These accounts began operation on November 19, 1974, with an ABP deposit of $50,000, and the first checks were written on November 21, 1974, and continued in operation thereafter. On approximately the same date, similar accounts were established at the Seattle First National Bank in Seattle, Washingon. Because of the time difference between Seattle and Omaha, and the fact that the Federal Reserve System providing for wire transfers ceases operation at 2:00 P.M. Eastern Time, the Seattle accounts could not be paid by wire transfer. Instead, the Seattle accounts operated on a system of "cash letters." ABP was required to keep $2,000,000 on deposit in the Seattle bank to "cover" the bank for the two-day time lag in collecting from the Northwestern National Bank in Omaha. When checks drawn by ABP on the Seattle bank were received at the Seattle bank, the bank would issue a "cash letter" through the Federal Reserve System requesting cash from the Northwestern National Bank. When, on three occasions, the cash letters were received in Omaha, the Northwestern National Bank refused payment because of insufficient funds.

Since the Federal Reserve had credited the Seattle bank and debited the Northwestern National Bank before the refusal, "Debit Letters" were issued by the Northwestern National Bank to the Seattle bank, thereby causing the Federal Reserve accounts for these banks to correctly reflect that the Northwestern National Bank had refused payment.

This cash letter/refusal/debit letter process occurred three times, between December 29, 1974, and January 7, 1975, constituting Counts 7-12.

At the Regency Hyatt House in Rosemont, Illinois, on December 10, 1974, at 10:00 A.M., Mr. Kovanda and Mr. Diederich, for GECC, and Mr. Clark and legal counsel David Pavel, for ABP, met with representatives of eleven banks, including Ed Kohout and Frank Seibert representing the

Northwestern National Bank of Omaha. A rough draft of the new credit agreement was passed around and met with general agreement. At the close of the meeting, it was decided that Mr. Diederich, of GECC, would iron out some legal technicalities, and that the parties would meet again on December 19, 1974.

The diversion was discovered on Friday, December 13, when Ed Kohout of the Northwestern National Bank in Omaha observed an employee of ABP (probably Gail Keenan) deposit checks, which appeared to be receivables, into the ABP corporate account. From his knowledge of the credit agreement, which he had obtained at the meeting three days earlier, he knew that customer checks were to go solely to lockbox accounts. He then called Mr. Kovanda at GECC's Chicago office and informed him of what he had seen. Mr. Kovanda informed Mr. Diederich of the substance of the call, and Mr. Diederich then called Lowell Smith at ABP, seeking an explanation. Smith wasn't willing to give a full explanation and merely told Mr. Diederich that there must have been some mixup. He then promised to look into the matter and call Mr. Diederich back, but never did. That afternoon, Mr. Diederich called again and was given the same explanation—that it was a clerical mixup.

On December 16, 1974 (Monday), Mr. Diederich came to Omaha to meet with legal counsel concerning the new loan agreement. He also set up a meeting at 4:30 P.M., in ABP's offices. Present were Tom Clark and Bill Edwards, of ABP, and Mr. Diederich. At the meeting, Mr. Clark stated that the practice of depositing receivables in the Northwestern National Bank had been going on for some time, possibly more than two years. Mr. Clark stated he knew about it as of September, 1974, while Mr. Edwards stated he knew of it in May, 1974. In addition, Mr. Clark states that he had told Frank West of the practice that afternoon and that Mr. West directed Mr. Clark to inform GECC immediately. Mr. Dederich asked how much was

involved (diverted) and Mr. Clark responded 3.5 to 4 million dollars.

Mr. Clark explained that when receivables were deposited in the Northwestern National Bank ABP would debit its cash account and make an offsetting entry in their miscellaneous receivables account #23. After 7-10 days, the funds would be wire transferred to the lockbox account in the ONB, whereupon ABP would debit the #23 account and credit the cash account, while crediting the trade receivables account #20 and debiting the GECC loan account (TR. 471). Mr. Diederich then called Mr. Schwartz at GECC's Chicago office and explained the details of the diversion. The meeting adjourned at 7:15 P.M. and Mr. Diederich flew back to Chicago that night.

That evening, Mr. Schwartz called Mr. Kovanda in Puerto Rico and informed him of the general problem. Mr. Schwartz was directed to go to Omaha and be physically present at ABP. Mr. Kovanda then called Mr. Clark at his home at approximately 10:00 P.M. (Puerto Rico time). Mr. Clark stated again that the diversion was about 3.5 million dollars; that Mr. West had no prior knowledge; and that he (Clark) didn't know about it before June, 1974.

At the Regency Hyatt House in Rosemont, Illinois, Wednesday, December 18, 1974, Mr. Kovanda, Mr. Schwartz, Mr. French, Mr. Diederich and Mr. Long, of GECC, met for dinner with Mr. West, Mr. Dick Robinson, Mr. Clark and Mr. Bill Edwards, of ABP. After dinner, the parameters of the diversion were discussed and Mr. Edwards stated that the diversion had got as high as 5.5 to 6 million dollars. Mr. Clark proposed a 120 day schedule [Exhibit 244A] for paying back the diversion by reducing inventory, selling a plant in Nebraska City, and by a sale and lease back of a plant in Fort Morgan, Colorado.

At the Regency Hyatt House at 10:00 A.M., the next day, December 19, Mr. French, Mr. Diederich, and Mr. Kovanda, of GECC, met with representatives of the eight

participating banks. Mr. Kovanda explained the situation regarding the diversion, after which Mr. West, Mr. Robinson, Mr. Clark and Mr. Edwards, of ABP, joined the meeting. Mr. Clark explained his proposal [Exhibit 224A] for replenishing the funds and asked that ABP be given 120 days to do so. The meeting adjourned in the afternoon, with ABP to make a formal request for a 120 day forebearance, and with the representatives of the banks to consult with their home offices.

On Monday, December 30, Lowell Smith conferred with Ed Kohout of the Northwestern National Bank at 2:00 P.M. Mr. Smith indicated that ABP was entitled to $1,200,000 as advances on cattle feeding loans (equal to 80% of inventory as determined at the end of each month). The next morning, Mr. Kohout called Mr. Smith and said that only $620,000 would be advanced.

First, briefly at the Granada Inn in Omaha, and then at Mr. West's office at ABP, late in the evening of December 30, Mr. Long, Mr. French, Mr. Kovanda, Mr. Diederich, of GECC, and Mr. Albino, GECC's house counsel, and Mr. Ruff, GECC's outside counsel, met with Mr. West, Mr. Robinson, Mr. Clark, Mr. Lee, and Mr. Pavel. Mr. Ruff stated that, due to the reluctance of the participating banks and GECC's own intentions, ABP would only be granted a 30 day forebearance of the diversion. The meeting concluded with Mr. Pavel, Mr. Ruff and Mr. Albino to draft the necessary documents, and the meeting to reconvene the next morning.

The next day, December 31, at 9:30 A.M., in Mr. West's office, Mr. Long, Mr. French, Mr. Kovanda, Mr. Albino and Mr. Ruff, of GECC, met with Mr. West, Mr. Robinson, Mr. Clark and Mr. Lee, of ABP. At this meeting, a 30 day forebearance agreement [Exhibit 213A] was signed.

Meanwhile, Lowell Smith and Mr. Diederich attempted to compute that day's "availability" figures. The testimony and documentary evidence is very confusing on this point,

but apparently Mr. Smith needed $5,100,000 to cover checks that came in that day, and he asked for that figure, even though he didn't expect to get it, as only $2,700,000 was "available." A $2,240,000 depository transfer check from the Seattle bank had been received at the Northwestern National Bank and was included in the $5,100,000 needed that day by ABP. Mr. Smith then asked for $4,600,000 which Mr. Diederich tentatively agreed to advance, but which was subsequently reduced by $1,400,000 after Mr. Diederich conferred with his superiors, Mr. Long and Mr. Kovanda. Thus, ABP received only $3,200,000.00. It should be noted, however, that the $3,200,000 further increased ABP's over advanced position by $500,000 over the amount of the diversion.

ABP employees insisted during the trial that they had been "shorted" $1,400,000.00. The Court has carefully reviewed the conflicting testimony of Mr. Smith, Mr. Kovanda and Mr. Diederich, as well as the adding machine tapes for December 31 (called "availability tapes") and can find no support for the position that they had been shorted. The probable source of the dispute over the availability on the 31st occurred the previous week when ABP did not kill on December 24 and 25. As a result, there were no new receivables generated on those days and the parties had a working arrangement to smooth out fluctuations in the loan that arose from holidays and other days on which no cattle were killed. Again, a holiday would produce no new receivables, even though checks for cattle purchased before the holiday would be received at the banks. About three days after the holiday, there would be a sudden drop in the amount of checks received at the banks, reflecting the fact that no cattle were purchased on the holiday. Thus, GECC would advance extra money on a holiday (or the day after, should the banks be closed that day) beyond the amount available. Three days later, GECC would recoup the overadvance. On December 26, only $3,650,000 was available, but GECC advanced $5,100,000 to cover the holiday fluctuation. On

December 31, they recouped the extra $1,450,000—therein lie the "shorted" funds.

On the afternoon of the 31st, the ABP Board of Directors met and discussed both short and long term financing. In addition, the Board was advised of the signing of the forebearance agreement with GECC.

At the close of the meeting, bankruptcy was discussed as a possible last resort, should ABP be unable to secure the necessary financing.

The next business day, Thursday, January 2, 1975, availability and the amount of GECC's advances were computed without dispute, although Mr. Smith unsuccessfully attempted to gain back the $1,400,000 he thought was shorted on the 31st. Apparently, ABP had sufficient cash to continue as $1,400,000 was wire transferred to the Seattle bank as promised. In the afternoon, a wire transfer from GECC to the Omaha National Bank was late in arriving. At 3:00 P.M., the bank began its procedure for returning the checks for insufficient funds, but at 3:20 P.M., the wire transfer was received and the checks were resubmitted.

Friday, January 3, saw ABP's financial plight worsen significantly. Mr. William Edwards, Treasurer for ABP, met in Frank West's office at 9:30 A.M. together with Tom Clark, Harvey Roffman and Richard Robinson. Mr. Edwards also conferred, by phone, with Mr. Pavel, an attorney for ABP, who indicated that ABP could pay certain creditors of ABP with certified checks. Mr. Pavel told Mr. Edwards that whether the checks would be preferences would be an issue for the Bankruptcy Court to decide. There is no doubt that the creditors paid by certified check were bona fide creditors. Around 11:00 A.M., Mr. Edwards went to Washington, D.C. with Mr. Roffman to attempt to secure financing (80 million dollars) from Arab interests. Mr. Edwards returned on the afternoon of January 4.

GECC advanced $3,575,000.00. Of this amount, $600,000 was earmarked for the Michigan National Bank; $250,000 for the Union Commerce Bank; and $2,725,000 was to go to the Northwestern National Bank for eventual wire transfer to the Seattle bank. Due to the problems experienced on December 31, the Seattle bank was unwilling to continue its practice of issuring depository transfer checks and instead wanted wire transfers to cover the previous day's checks. The money earmarked for the Seattle Bank ($2,725,000) was insufficient, by several hundred thousand dollars, to cover the previous day's checks. In Frank West's office at ABP, Lowell Smith, Tom Clark, Robert Lee, William Edwards and Richard Robinson discussed the cash shortage at the Seattle bank. A decision had to be made by 2:00 P.M., Omaha time (12:000 Noon Seattle time) because by rule of the Federal Reserve the checks had to be either returned or paid by noon Seattle time. Although denied by Mr. West, the Court finds that he was present at this meeting and that he made the ultimate decision to have the checks returned. This decision was made at 2:20 P.M. Omaha time. However, by then the Seattle bank was already in the process of returning the checks. Subsequently, Lowell Smith wired $2,725,000 to Seattle.

He then called the Seattle Bank and requested that a total of $717,894 be wire transferred back to the accounts of Best Transportation, Superior Insurance, Nebraska Hog Buyers, Mike Amoura, Superior National Installations, and to other accounts of unknown ownership. Mr. Pixley of the Seattle bank refused to return the money, as his bank's policy was to freeze an account once any checks drawn on that account were returned. Eventually, the ABP money in the Seattle bank was disbursed, $1,500,0000 to pay depository transfer checks, $1,000,000 was returned to ABP on January 7, and $1,560,000 was returned to ABP on January 9.

At approximately 2:00 P.M., Lowell Smith called the Wachovia Bank and informed Mr. Christie that ABP could not wire the funds that day. Mr. Christie instigated bank procedure to return the checks and requested Mr. Smith to confirm in writing the unavailability of funds. Mr. Christie took the compensating balance and paid it out, starting with the smallest checks received that day.

At various times during the 3rd, the following checks drawn by ABP on ONB were written and certified:

a. $12,763.52 payable to Midwest Order Buyers, Inc.
b. $63,816.96 payable to Northwestern Order Buyers
c. $62,098.35 payable to Ron Bruck
d. $281,815.94 payable to Omaha Hog Buyers
e. $61,781.90 payable to Floyd Kraukau
f. $4,256.38 payable to Best Refrigerated Express
g. $66,056.13 payable to " " "
h. $126,614.72 payable to Farmland Order Buyers

While the circumstances surrounding the issuance of these checks are unusual and somewhat suspicious, all were in payment of valid bills or debts owed by ABP. In each instance, the recipient of the checks was a former business associate of Mr. West—some of whom owed money to Mr. West. The checks were, however, written on the advice of counsel, who was of the opinion that payment was legal, although, should ABP file for bankruptcy, the money might have to be returned in the event the Bankruptcy Court found the checks to be a preference, and, in fact, some of the money was ordered to be returned.

Mr. Grover, Operations Controller for ABP, was told by Tom Clark to have the seven plant controllers hold invoices until further notice. Mr. Grover did so. Also, on this date, Tom Clark instructed Mr. Grover to have the plant controllers delay the issuance of checks for one day. Delaying checks for a day had been done before, but was not a common occurrence.

Throughout January 3, ABP livestock buyers in the field purchased cattle in accordance with the instructions they received early in the morning from the ABP "buying office." Each of the buyers was equipped with a two-way radio, enabling them to communicate with the buying office while they were out in the field, and many of the counts relate to the failure of ABP to communicate with their buyers and tell them not to buy. As a practical matter, however, the volume of cattle purchased on the 3rd was below normal, and most had been purchased before ABP's cash problem with the Seattle bank had reached its full dimension.

ABP cattle buyers, as is typical in the business, would transact their purchases with a minimum of paperwork. The buyer attempted to keep track of the quality and maturity of the cattle owned by the various feeders in his area. When he felt the cattle were ready for slaughtering, he would visit with the feeders and the two would agree to a price and shipping arrangements. Typically, delivery to the packinghouse was scheduled for three to seven days after the initial purchase and oftentimes the feeder would accompany his cattle to the packinghouse where he would receive a check after the cattle were weighed. Other pricing techniques ("Hot weight basis" and "Grade and yield basis") required that the cattle be slaughtered before the total price could be determined. In those cases, a check was mailed to the feeder.

On Saturday, January 4, 1975, Mr. West called Mr. Kovanda and requested that Mr. Kovanda set up a meeting in Stamford, Connecticut (GECC's home offices) with Mr. Long. Mr. West stated that the purpose of the meeting was to permit Mr. Leonard, an attorney for ABP, to make a proposal to solve the problems of ABP. Mr. Kovanda, in a series of phone calls, set up a meeting for the date requested by Mr. West—January 6, 1975.

ABP cattle buyers purchased cattle from several feeders for delivery Sunday evening or early Monday morning. Most of the cattle buying was done in the morning, and the volume purchased was less than usual for a Saturday.

Throughout Saturday, Mr. Clark and Mr. West sought sources of long term financing, including the Monsanto and Teamsters Pension Funds. That afternoon, attorneys for ABP started drafting a Chapter 11 Bankruptcy petition that was to be used in the event ABP was unsuccessful in obtaining additional financing from GECC.

The cattle purchased on the 3rd and 4th of January were delivered for slaughtering on Monday, January 6, and were slaughtered beginning early in the morning and ending around 3:00 P.M. As previously stated, the number of cattle slaughtered on the 6th was below normal.

At 2:30 P.M., Monday, at GECC's headquarters in Stamford, Connecticut, Mr. Don Leonard, Mr. Charles Sikes and Mr. Clark, of ABP, met with Mr. Long, Mr. French, Mr. Albino and Mr. Kovanda, of GECC. Mr. Clark explained that ABP needed $5,000,000 immediately, and asked that GECC loan the money and guarantee all drafts in transit, amounting to 13 million dollars. The representatives for ABP stated that if GECC turned them down ABP would be forced into bankruptcy. Mr. Long refused the request and stated that he was caught by surprise at the size and timing of the request. Mr. Long requested that any filing of bankruptcy be delayed until he could discuss the matter with Mr. West. Mr. Long called Mr. West. Mr. Leonard also talked to Mr. West and, in heated words, Mr. Leonard asked Mr. West not to file bankruptcy.

The meeting adjourned with Mr. Kovanda flying back to Chicago with Mr. Clark, Mr. Sikes and Mr. Leonard, while Mr. French, Mr. Long and Mr. Albino made reservations to fly to Omaha on the 7th.

On January 7, 1975 (Tuesday), ABP and BI filed bankruptcy under Chapter 11 early in the morning. Mr. Kovanda flew from Chicago to Omaha and met with other GECC representatives, Mr. Raff, Mr. Albino, Mr. Long and Mr. French at the Hilton Hotel.

Richard F. Grover, Operations Controller for ABP, received instructions from Tom Clark in the morning of January 7 to have the seven plant controllers (in Oakland, Harlan, Beefland, Nebraska City, Omaha, Fort Morgan and Dumas) stop writing checks in payment for livestock.

Turning now to the facts surrounding ABP's transactions with the Chapman Cattle Company, the Court makes the following specific findings of fact pursuant to F.R.Cr.P. 23(c).

William Chapman, President of Chapman Cattle Company, testified that he sold 150 head of cattle at 5:00 or 5:30 P.M. on Friday, January 3, 1975, to ABP. [Tr. 1149]. He became concerned that something wasn't right when ABP truckers picked up the cattle for slaugher early Monday morning, January 6, 1975, because cattle that he had sold in the past had not been picked up by ABP for 5-10 days. ABP employees began loading cattle at the Dinklage Feed Lot, where the Chapman cattle were located, at about 7:00 A.M., Mountain Time, on January 6, 1975. This feed lot is located in Sidney, Nebraska, approximately 75 miles from ABP's Ft. Morgan plant, so the cattle were not delivered to the plant until approximately 9:30 A.M., Mountain Time (10:30 A.M., Omaha time). The transportation of these cattle is charged in Count 41.

Duane Von Seggern, the feed lot manager at Sidney, was also concerned that something was not right at ABP because they had cancelled some orders for delivery on January 7, 1975. At 10:33 A.M., Mountain Time, on January 6, 1975, Mr. Von Seggern called the ABP buyer, Dave Gertge, at the Ft. Morgan plant to find out why they had

cancelled other sales. He was told that they were not going to kill on January 7, 1975. This telephone call is charged in Count 42.

The order not to kill on the 7th was received in a telephone conversation that Brent DaBell, the ABP plant manager, testified that he had with Virgil Eades. DaBell was not sure of the time, but he testified that Eades instructed him to "kill all the cattle we had on hand and not plan any kill for the following day." [TR. 1449]. Since Mr. Von Seggern called Mr. Gertge because sales of cattle had been cancelled, the call between Mr. DaBell and Mr. Eades had to be prior to 10:30 A.M., on January 6, 1975. This timing is important, because it could not have been too much before 10:30 A.M. that the 150 head of Chapman cattle arrived at the ABP plant.

Having determined that ABP was not going to kill on the 7th, a weekday and a very unusual occurrence, Mr. Chapman and Mr. Von Seggern became suspicious and began efforts to secure the return of Mr. Chapman's cattle. At approximately 2:00 P.M. on the 6th, Chapman called Mr. Von Seggern and told him to go to ABP's Ft. Morgan plant and pick up the check for the cattle. Von Seggern called the ABP plant and was told that the Ft. Morgan plant was not in any trouble and that the check would be mailed [Charged in Count 43]. Von Seggern wanted the check, however, and did in fact drive to Ft. Morgan and pick up the check in the amount of $69,417.64. This check was drawn on the Michigan National Bank in Detroit and has been introduced in evidence as Exhibit 41G.

Mr. Chapman then had a private pilot fly to Sidney that evening and pick up the check, so that he could present it for payment Tuesday morning. He then had his secretary flown to Detroit where she made an attempt to cash the check the following morning, but payment was refused by the Michigan National Bank. This development prompted Mr. Chapman's secretary, Roselle Calmes, to

make two telephone calls from Detroit to Mr. Chapman in Omaha, as charged in Count 44.

Once Chapman determined that he was not going to be paid for his cattle, he started making efforts to attach the carcasses in some way. He called the Ft. Morgan plant four times [charged in Count 45] on January 7. 1975. He talked the first time to Mr. DaBell, the plant manager, to try to find out if the carcasses were still in the cooler. Mr. DaBell promised to check to find out this information and call Chapman back. The manager failed to return the call, so Mr. Chapman called again. Mr. DaBell told him the carcasses were still there and Mr. Chapman requested that he identify the carcasses in some way. Mr. DaBell informed him he had to check Omaha to determine what action to take. Mr. DaBell again failed to return the call, so Chapman called again. This time, DaBell informed Chapman that he had checked with Omaha and was instructed to take none of the action Chapman had requested. Chapman again requested that the carcasses be identified and DaBell said he would if he could. About one hour later, Chapman called again and was told that all the meat had been shipped out and, in the words of the manager, it was c'est le vie." [TR. 1143].

On January 7, 1975, Mr. Von Seggern was also attempting to obtain the Chapman beef. He called the ABP plant at 9:46 A.M. [Charged in Count 46], almost three hours before the Chapman calls were made. He was told at that time that the beef had all been shipped out and the plant was locked up.

The next day, January 8, Mr. Von Seggern made one additional call to the Ft. Morgan plant, but had no success in obtaining either the carcasses or payment. This call is charged in Count 47.

With the foregoing background of facts, the Court must now turn to the specific charges made in the indictment. Although not required to do so under F.R.Cr.P. 23 or 29,

the Court will review the factors it considered in dismissing many of the counts against the remaining defendants, ABP and Frank West. The dismissals of Robert Lee and Beefland International have been already explained by the Court on previous occasions.

The evidence presented in this case clearly shows that, from June, 1974, through the filing of bankruptcy on January 7, 1975, ABP was in desperate need of cash on a day to day basis. The efforts of Tom Clark and Frank West to secure long term financing were unavailing, and construction of the Dumas plant was draining working capital at an alarming rate. Obviously, ABP had expanded too fast without adequate financing. ABP's solution to this problem was to intentionally divert monies from their major creditor. What began as a system for handling customers who made inadvertent mailings to ABP's headquarters, or who were credit risks, gradually escalated into a scheme to defraud. At some time prior to the summer of 1974, the shortage of cash prompted intentional diversions of checks from some of ABP's largest customers. These customers were not credit problems, nor were the mailings to ABP's headquarters inadvertent. James Taphorn testified [TR. 783-785] that he discussed the diversion with Frank West on six to twelve occasions. Taphorn would indicate how much had been diverted and would request that Mr. West order the conversion of liquid assets (e.g., cattle on feed) into cash by the end of the particular month. During Mr. Taphorn's tenure as financial vice-president, the diversion was reduced to zero at the end of each month, so as to present a "clean" financial statement. Shortly after Mr. Taphorn left ABP, in June of 1974, the scheme became more sophisticated. Instead of "cleaning up" the diversion at the end of each month, an artificial accounting practice was initiated that permitted the diversion to continue unabated and undetected through the month end financial statement. To summarize the Court's earlier findings, the money collected was shifted from the main receivables account into a miscel-

laneous receivables account, without any indication that the money had not only been received but also spent. In *United States* v. *Simon*, 425 F.2d 796 (2 Cir. 1969); *cert. den.* 397 U.S. 1006, the Second Circuit painstakingly reviewed the possible criminal liability incurred through improper accounting of receivables. The test is whether the financial statements as a whole fairly present the financial position of the company. If they do not, the basic issue becomes whether the defendants acted in good faith. Proof of "good accounting practices," while it may be highly persuasive, is not conclusive in resolving questions of good faith.

There can be no dispute that ABP's accounting system misrepresented its financial position. One only has to look to the testimony of Gail Keenan [TR. 714, et seq.] to see patent lack of good faith. She related how what was essentially a secret set of books was maintained and hidden from GECC auditors.

The defendants contend, however, that the diversion was lawful and in accord with certain language in the contract. After careful study of the contract language, the Court cannot agree with the defendants' position that ABP was entitled to retain receivables for 10 days before turning them over to GECC. The pertinent contractual language is as follows:

> 8. GECC hereby grants permission to Assignor on the conditions herein specified, to collect Assigned Accounts, at no cost or expense to GECC, but such privilege may be terminated at any time by GECC. x x x . . . x x x GECC shall have the right to send notification of Assignment to any or all Account debtors, and GECC shall thereafter have the sole right to collect the same. Assignor, while collecting any Assigned Accounts, shall receive any and all collections thereon, in cash or otherwise, solely on behalf of and in trust for GECC; and Assignor expressly agrees, immediately upon receipt thereof, to transmit and deliver all such collections to

> GECC in kind, in the exact form and manner in which the same were received by Assignor. Any collections received by Assignor from any Account debtor owing on any Assigned Account, whether or not then due, shall be presumed applicable to such Assigned Account. . . .

Security Agreement Rider ¶8, plaintiff's Exhibit 203A. [x's in original].

In *Decker-Ruhl Ford Sales, Inc.* v. *Ford Motor Company*, 523 F.2d 833 (8 Cir. 1975), the Eighth Circuit considered virtually identical contract language and found that any failure of the Assignor to promptly tender monies to the Assignee was not only a prohibited delay, but also a breach of a fiduciary relationship.

Even assuming that the contract between GECC and ABP permitted a 10 day delay, the evidence before the Court indicates that most of the customer checks were used substantially more than 10 days. In addition, the evidence is clear that when the diversion was discovered both ABP and GECC treated it as a blatant violation of their agreement. The Court concludes that the diversion was in no ways contemplated or condoned under the credit agreement.

The Court is equally unpersuaded by defendants' contention that the diversion was, at most, a breach of contract for which there should be no criminal liability. They argue that interest was paid on all monies diverted by ABP and that the diversion was fully secured by various real estate mortgages. This case, however, goes far beyond willful breach of contract for which ABP could be liable for punitive damages. It is the intentional, deliberate, and planned concealment of the breach of contract that justifies the imposition of criminal sanctions. *United States* v. *George*, 477 F.2d 508 (7 Cir. 1973); *Epstein* v. *United States*, 174 F.2d 754 (6 Cir. 1949). *Epstein, supra*, is highly instructive

as it distinguishes "active" as opposed to "constructive" fraud, and calls for the imposition of criminal sanctions only in cases of active fraud.

> Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive. [Citations omitted]. Constructive fraud is a breach of legal or equitable duty which in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests. *Id.* at 765-766.

In Accord, Post v. *United States*, 407 F.2d 319 (D.C. Cir. 1968), *cert. den.* 393 U.S. 1092; *Shushan* v. *United States*, 117 F.2d 110 (5 Cir. 1941), [133 A.L.R. 1040], *cert. den.* 313 U.S. 574, *Reh. den.* 314 U.S. 706. The evidence presented in this case, in light of the governing legal principles stated above, convince the Court that the diversion of funds from GECC constituted actual fraud.

The defendants' last argument on the issue of fraud is that, had they intended to defraud GECC, the most expeditious method would have involved "phony" invoices. This argument misses the mark, as GECC auditors spot checked invoices every month to determine if they accurately reflected merchandise actually sold. Falsifying invoices clearly was not an available method of perpetrating the fraud, without incurring a substantial risk that the scheme would be detected.

Turning now to the element of specific intent, several witnesses testified to Mr. West's knowledge of the diversion. Mr. Taphorn stated he discussed the matter with Mr. West on six to twelve occasions [TR. 783-785]. Mr. Clark stated that he discussed the diversion with Mr. West on "numerous

occasions" [TR. 1538]. Mr. West, predictably, denied that he was ever told [TR. 1939], but later admitted at least some knowledge of the diversion during cross-examination.

> Q. Didn't he [Mr. Taphorn] recommend to you that you stop spending money on Dumas?
>
> A. No.
>
> Q. Didn't he on numerous occasions tell you you had to sell cattle that you were holding, your own cattle, so that you could pay back GE?
>
> A. No.
>
> I will explain if you would like.
>
> Mr. Taphorn would come to us and tell us he would be in trouble on his loan and he overextended.
>
> Q. He would tell you you were overextended with GE?
>
> A. I am not done.
>
> That he is going to be in to GE, and he would ask us how many cattle we intended to kill, how many hours we intended to work, and from there we would figure out whether we had to kill less cattle or sell feed lot cattle and if the cattle were fat—we never sold cattle that wasn't fat. [TR. 2001].

Therefore, the evidence shows beyond a reasonable doubt, in the Court's mind, that Mr. West had personal knowledge of the diversion at least as early as June, 1974. He may not have known all of the details of the diversion, but the Court finds that he did know of the approximate size of the diversion each month; that it was effectuated by requesting customers to mail checks to the corporate headquarters, in violation of the credit agreement; and that it was necessary to transmit false information to GECC to maintain the di-

version. At this juncture, it should be noted that Mr. West was the President, Chairman of the Board, and largest single stockholder of ABP. His office at ABP headquarters was the site of frequent informal meetings on all phases of the corporation. While his knowledge of the diversion cannot be imputed, these circumstantial facts forcefully rebut Mr. West's testimony [TR. 1939] that he did not know of the diversion. *United States* v. *Interstate Engineering Corporation,* 288 F.Supp. 402 (D. N.H. 1967) at 413; *Irwin* v. *United States,* 338 F.2d 770 (9 Cir. 1964), *cert. den.* 381 U.S. 911; *United States* v. *Press,* 336 F.2d 1003 (2 Cir. 1964), *cert. den.* 379 U.S. 965; *Hoffman* v. *United States,* 353 F.2d 188 (10 Cir. 1965). Likewise, the Court finds clear evidence that the corporation is chargeable with knowledge of the diversion, as the intent and knowledge of its employees are imputed to it.

These facts and reasons convince the Court, beyond a reasonable doubt, that both Frank R. West and American Beef Packers devised a scheme or artifice to defraud GECC by means of false or fraudulent representations; and that Frank R. West and American Beef Packers acted with the specific intent to carry out some essential step in the execution of the scheme or artifice to defraud.

SPECIFIC MAILINGS

Twenty-five counts relate to the diversion of funds from GECC [Counts 75 through 82, inclusive; 84 through 97, inclusive; and 99 through 101, inclusive], consisting of 7 counts alleging violations of 18 U.S.C. § 1343, and 15 counts alleging violations of 18 U.S.C. § 1341. § 1341 provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or fur-

nish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit of spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The essential elements of these two statutes are as follows:
§ 1341

1. The act or acts of having devised (or intended to devise) a scheme or artifice to defraud certain creditors and livestock feeders by means of false or fraudulent representations;

2. The act or acts of placing (or causing to be placed) in an authorized depository for mail matter a letter intended to be sent by the Postal Service; and

3. So using the mails willfully, and with the specific intent to carry out some essential step in the execution of the scheme or artifice to defraud.

§ 1343

1. The act or acts of having devised (or intended to devise) a scheme or artifice to defraud certain creditors and livestock feeders by means of false or fraudulent representations;

2. The act or acts of transmitting (or causing to be transmitted) any signals or sounds by means of wire or radio communications;

3. That the transmission be in interstate commerce; and

4. So transmitting willfully, and with the specific intent to carry out some essential step in the execution of the scheme or artifice to defraud.

The Court will here relate the specifics of each mailing, phone call or wire transfer, in furtherance of the scheme or artifice to defraud. During the trial of this case, exhibits were numbered according to the count in the indictment to which they relate.

Mr. William Hoffman and Shirley Tatera, of Ed Miniat, Inc., testified to Counts 75 through 80. Exhibits 75 and 76 are wire transfers and the invoices paid therewith. These wire transfers to the ABP headquarters were at the request of ABP and the funds were used for 10 and 20 days, respectively, before being forwarded to GECC. There are deposit slips in Exhibit 401 showing these funds being deposited in the Northwestern National Bank on the respective day the wire transfer was made. Alfred Drake, controller at the Northwestern National Bank, testified that all of the deposit slips contained in Exhibit 410 represent money wire transferred into the defendants' bank account.

Contained in Exhibit 400 are wire transfer records which reflect the date on which the above described funds were transferred from the Northwestern National Bank to the ONB account of GECC. Again, these records show the date the transfer was made. Mr. Hoffman further testified that Herbert Schrader requested that these particular wire transfers be made. An examination of the invoices paid by these particular wire transfers shows that these payments should have been remitted to the GECC lockbox in Cleveland, Ohio.

Counts 77 through 80 all involve checks which again were mailed to the defendants' headquarters in Omaha, rather than the GECC lockbox in Cleveland. Exhibits 77 and 78 even have the Cleveland address on them, but the endorsement shows they were deposited into the Northwestern National Bank in Omaha, Nebraska, indicating that Miniat had prepared these checks for mailing to the GECC lockbox, but that before the checks were mailed they were instructed to send them to Omaha instead. In Exhibit 403 are the respective deposit slips showing the date of deposit of these items into the Northwestern National Bank, while Exhibit 400 contains the wire transfer records reflecting the date of transfer to GECC. Exhibits 79 and 80 are checks reflecting similar transactions charged in Counts 79 and 80.

Count 81 and Counts 84 through 88 are established by Exhibits 81 and 84 through 88, as well as the testimony of Shirley Tatera. Mrs. Tatera testified that all of these checks are mailed on or about the day they are prepared. Again, Herbert Schrader testified that he would call this company and request them to mail the checks to Omaha, rather than the lockbox identified on their invoice. The funds represented by these wire transfers and checks were used by American Beef Packers for anywhere from 7-42 days, and may be traced through the Northwestern National Bank and eventually into the ONB by examining the bank records in evidence.

Counts 89 through 97 are established again by the bank records, Exhibits 89 through 97, and the testimony of John Wallant, Vice President of the Glen and Anderson Company of Chicago. Mr. Wallant identified the Exhibits 89 through 97 as either wire transfer records or checks remitted by Glen and Anderson to ABP, together with invoices. He testified that they would normally send their payment to the place designated on the defendants' invoice, but that these occasions Herb Schrader called him and had him mail the checks to Omaha. He further testified that in the company's normal course of business, the checks would be mailed out on or about the date they are typed.

Counts 89, 90 and 91 are all wire transfers of funds from Glen & Anderson in Chicago to the defendants' account at the Northwestern National Bank, Omaha, Nebraska. Exhibits 89, 90 and 91 are records of the amount and date of these wires. Again, the invoices reflect the remittances should have gone to the GECC lockbox in Cleveland. Exhibit 401 contains the deposit slips showing that these funds were deposited into the ABP's account at the Northwestern National Bank. The records reflect that these funds were diverted for 20, 31 and 26 days respectively.

Counts 92 through 97 are all Glen & Anderson checks that were mailed to the defendants' headquarters and followed the same diversion pattern, and were diverted for periods up to 20 days. Again, the invoices reflect that these checks should have been remitted to the GECC lockbox in accordance with their agreement. These funds may be traced through the Northwestern National Bank and eventually into the ONB by examining the bank records in evidence.

Count 97 [Exhibit 97] involves a check dated January 3, 1975. This particular check is one that the defendants diverted from GECC and differs from the others in that it was later in time. Between December 13, 1974 and January

3, 1975, there is no evidence of funds being diverted from GECC, as the GECC auditors were constantly in the defendants' headquarters and closely observing their activity. This particular check shows that on January 3, 1975, the defendants again started to divert funds from GECC.

Counts 99, 100 and 101 are established by Exhibits 99A and B, 100 and 101, as well as the bank records and the testimony of Everary Eilers, an employee of Safeway Stores. It is clear from examining the exhibits and endorsements thereon that the three checks were sent to the defendants' headquarters, rather than to the lockbox indicated on the invoice. Even though Exhibit 100 has the Cleveland address on it, the endorsement shows it was deposited into the Northwestern National Bank. This again indicates the check was diverted from the lockbox after it was prepared. The deposit slip for this particular check, contained in Exhibit 403, reflects the check was deposited into the defendants' account on September 3, 1974. The wire transfer record contained in Exhibit 400 reflects this money was transferred to the GECC account on September 16, 1974, indicating that this money, in excess of one million dollars, was used by the defendants for 13 days before it was remitted to GECC. Mr. Eilers further testified that in the normal course of the company's business the checks are mailed on or about the day they are typed.

At this juncture, it should be noted that these 25 counts do not represent the only checks diverted. Exhibits 338A, 339A, 340A and 337A contain numerous checks that were also diverted, but on which the defendants have not been indicted. The evidence is overwhelming, and convinces the Court beyond a reasonable doubt that the mailings and interstate wire transfers alleged in Counts 75, 76, 77, 78, 79, 30, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100 and 101 did in fact occur; that they were essential steps in furtherance of a scheme or artifice to defraud; and that they were foreseeably done or caused to be done by the

defendants, Frank R. West and American Beef Packers, having the specific intent to defraud.

Each of the essential elements as to these counts having been proved beyond a reasonable doubt, the Court finds the defendants, Frank R. West and American Beef Packers, guilty as charged in Counts 75, 76, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100 and 101.

American Beef Packers (but not Frank West) also stands charged in 4 counts of mailing false financial statements to GECC. Exhibits 71, 72, 73 and 74 are ABP financial statements mailed near the end of June, July, August and October, 1974, respectively. Mr. Diederich established the date of receipt and that they had been mailed. As previously stated, these statements were materially false and were mailed with the specific intent to defraud, in furtherance of and as an essential step in the scheme or artifice to defraud GECC. Each of the essential elements as to these counts having been proved beyond a reasonable doubt, the Court finds the defendant, American Beef Packers, guilty as charged in Counts 71, 72, 73 and 74.

Turning now to those counts alleging events which occurred after December 16, 1975 (after the diversion was discovered) the Court can posit criminal liability only if there was proved a scheme or artifice to defraud. Except for the one check charged in Count 97, the scheme to divert monies from GECC ended on December 16. In essence, the prosecution charges that the defendants devised another scheme or artifice consisting of a planned bankruptcy. There is evidence in the record supporting the Government's theory; however, it was insufficient, as a matter of law, to form the basis of guilt beyond a reasonable doubt. Proof of a scheme or artifice to defraud is, at best, a difficult task, and usually must be attempted with conflicting circumstantial evidence. Such was the case here. The record shows that someone at ABP ordered the special envelopes used in the bankruptcy on December 31, 1974—three working days

(seven full days)—before the filing of bankruptcy. Also, on December 31, at the ABP Board of Directors meeting the possibility of bankruptcy as an option of last resort was discussed. In addition, ABP had considerable difficulty arranging for the payment of checks at the Northwestern National Bank.

The next working day, January 2, 1975, was uneventful, and ABP was able to meet its commitments to the Northwestern National Bank. On the afternoon of January 3, ABP's inability to meet its debts as they matured became plainly evident and some cattle were purchased after that time. Likewise, when the cattle were slaughtered on the 6th, ABP was in dire financial straits. Although this evidence admits the possibility of fraud, it must be remembered that there is considerable exculpatory evidence on the issue of intent to defraud, and even the evidence against the defendants is subject to varying interpretations. The special envelopes were not received by ABP until January 10. Had the bankruptcy been planned as a scheme to defraud, these envelopes, essential to a scheme. would have been ordered sufficiently in advance so as to insure they would be available on the day bankruptcy was filed. Likewise, there is undisputed evidence that the volume of livestock purchased and slaughtered from January 3 through January 6 was smaller than usual. One would expect a high volume of purchases if bankruptcy were planned, so as to reap the maximum revenue. Cattle purchases on the 6th would also be expected. Likewise, one would expect orderly and systematic preparation, rather than the confusion and indecision so evident in the record.

It is the Court's considered judgment that the evidence readily supports a finding that the management and employees of ABP exercised poor business judgment. They were tardy in realizing the extent of their financial plight, and overly optimistic in expecting GECC to loan further funds. In considering a directed verdict, the Government is

entitled to the benefit of all reasonable inferences to be drawn from the evidence. However, where the evidence is equally strong to infer innocence as it is to infer guilt, a directed verdict of acquittal is not only proper, but mandated. *United States* v. *Kelton*, 446 F.2d 669 (8 Cir. 1971); *Epstein* v. *United States*, 174 F.2d 754 (6 Cir. 1949). The Court's ruling in dismissing these counts, at the close of all the evidence, should in no way indicate that the Court condones the conduct of the defendants. What may be admirable courage and optimism in a small businessman may well be reckless mismanagement in a corporation the size of ABP. It must be remembered that the existence of a scheme to defraud is an essential element of the crime charged—recklessness, reprehensible as it may be, is insufficient. The impact of ABP's failure on the cattle business was far reaching; but this fact is immaterial to the Court's decision, as the criminal statutes involved in this case must be applied evenly, without regard to the financial injury resulting from the defendants' conduct. In every bankruptcy, there are unpaid creditors who, under the law, bear the financial burden of the bankrupt's errors The size of the burden, by itself, raises no inference of a scheme to defraud. The Court, therefore, reaffirms the directed verdict of acquittal entered at the close of all the evidence, [as to Frank West on Counts 1 through 74, inclusive; 83 and 98; and 102 through 105, inclusive; and as to ABP on Counts 1 through 40, inclusive; 48 through 70, inclusive; 83 and 98; and 102 through 104, inclusive].

ABP's transactions with the Chapman Cattle Company stand on a different footing. Mr. Chapman, unlike the other cattle feeders, realized on January 7 that ABP might not be able to pay for the cattle purchased three days earlier. In his efforts to have the cattle paid for, returned, or identified for attachment purposes, he was totally frustrated by ABP. See U.C.C. §§ 2-703, 2-704 and 2-705. Counts 43 through 47, inclusive, are clearly supported by the evidence. Brent DaBell, manager of ABP's Fort Morgan plant, re-

peatedly deceived and stalled both Mr. Chapman and Duane Von Seggern. At least at the Fort Morgan plant, there was in existence a scheme to defraud Mr. Chapman, consisting of a plan to falsely maintain that ABP was not in *any* financial difficulty; to delay presentment of Mr. Chapman's check [Exhibit 41G]; and to deliberately and purposefully resist efforts to identify the cattle. There is, however, only equally balanced evidence on Counts 41 and 42. Count 41, charging the transportation of the cattle, and Count 42, charging a telephone call in which Mr. Von Seggern was told that ABP was not going to kill on the 7th, stand on the same analysis as those counts dismissed by the Court at the close of all the evidence.

As to Count 47, the Court has carefully considered the principles enunciated in *United States* v. *Maze*, 414 U.S. 395 (1974) and concludes that a judgment of acquittal is required as to this count. The telephone call charged in Count 47 occurred after the petition for bankruptcy was filed, and furthermore there is no evidence that Mr. Chapman's cattle were still at Fort Morgan when the call was made. It is, therefore, quite possible that the scheme to defraud Mr. Chapman was completed at the time of the call and that the call was not essential to the fruition of the scheme.

The defendant, ABP, contends the Government must prove the particular person within ABP having the requisite specific intent to defraud. Even if such was the law, the evidence clearly shows that Mr. DaBell, plant manager, had the requisite specific intent to defraud, and the Court finds that he was a member of ABP's central management, so as to make his conduct and intent properly referrable to the corporation.

These findings of fact and conclusions of law convince the Court, beyond a reasonable doubt, that the interstate telephone calls alleged in Counts 43, 44, 45 and 46 did, in fact occur; that they were essential steps in furtherance of a scheme or artifice to defraud; and that they were done

or caused to be done purposefully, with the specific intent to defraud. Each of the essential elements as to these counts having been proved beyond a reasonable doubt, the Court finds the defendant, American Beef Packers, guilty as charged in Counts 43, 44 and 45.

As to Counts 41, 42 and 47, the Court finds the defendant, American Beef Packers, not guilty.

Two orders, in accordance with the specific findings of fact and conclusions of law stated herein, are filed contemporaneously herewith.

Dated this 21st day of January, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	CRIM. NO. 75-0-87
	)	
Plaintiff,	)	
vs	)	ORDER
	)	
AMERICAN BEEF PACKERS, INC.,	)	
	)	
Defendant.	)	

In accordance with the specific findings of fact and conclusions of law stated in the Memorandum filed contemporaneously herewith,

THE COURT HEREBY FINDS the defendant, American Beef Packers, Inc., guilty as to Counts 43, 44, 45, 46, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100 and 101 of the indictment.

THE COURT HEREBY FURTHER FINDS the defendant, American Beef Packers, Inc., not guilty as to Counts 41, 42, 47 and 82 of the indictment.

Dated this 21st day of January, 1976.

BY THE COURT

s/ Robert V. Denney
Robert V. Denney
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	CRIM. NO. 75-0-87
	)	
Plaintiff,	)	
vs	)	ORDER
	)	
FRANK R. WEST,	)	
Defendant.	)	

In accordance with the specific findings of fact and conclusions of law stated in the Memorandum filed contemporaneously herewith,

THE COURT HEREBY FINDS the defendant, Frank R. West, guilty as to Counts 75, 76, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100 and 101 of the indictment.

THE COURT HEREBY FURTHER FINDS the defendant, Frank R. West, not guilty as to Count 82 of the indictment.

Dated this 21st day of January, 1976.

BY THE COURT

s/ Robert V. Denney
Robert V. Denney
United States District Judge

APPENDIX C

Telephone (402) 348-1811

Law Offices of
Lathrop & Albracht
David S. Lathrop
S. J. Albracht
Richard L. Swenson

460 Continental Building
Omaha, Nebraska 68102

October 25, 1976

Mr. Jim Linn
Suite 410 Fidelity Plaza
Robert S. Kerr at Robinson
Oklahoma City, OK 73102

Re: U.S.A. vs. West

Dear Jim:

Mark has asked that I write you a letter concerning my findings from the office of the Clerk of the United States District Court.

There were no indictment returned between May 29, 1975, and August 8, 1974. Mike Schleich, the assistant U.S. Attorney, tells me that the new grand jury came on Tuesday, August 5, 1975. On August 8, 1975, the following indictments were returned:

CASE NO.	TITLE	CHARGE
75-0-72	U.S.A. v. Steed	Uttering forged obligations. 2 counts
75-0-73	U.S.A. v. Gilmore	Uttering forged obligations. 2 counts

CASE NO.	TITLE	CHARGE
75-0-74	U.S.A. v. Leersom	Stolen goods. 1 count
75-0-75	U.S.A. v. Braham	Interstate theft aiding and abetting. 1 count
75-0-76	U.S.A. v. Johnson	Forgery of treasury check. 1 count
75-0-77	U.S.A. v. Karnes	Forgery. 2 counts
75-0-78	U.S.A. v. Schnebel	Forgery 1 count
75-0-79	U.S.A. v. Butler	Food Stamp Violation 1 count
75-0-80	U.S.A. v. Osborn	Dyer Act. 1 count
75-0-81	This was an Information.	
75-0-82	U.S.A. v. Tyndall	Non-payment, Fire-arms Tax 2 counts
75-0-83	U.S.A. v. Tyndall	Assault on Indian Reservation. 1 count
75-0-84	U.S.A. v. Country	Murder within Indian Country. 1 count
75-0-85	U.S.A. v. Presley	Interstate Transportation of Forged Security. 1 count
75-0-86	U.S.A. v. West & Carlson	Conspiracy. 1 count

CASE NO.	TITLE	CHARGE
75-0-87	U.S.A. v. West & Lee	Conspiracy & False Pretense. 105 counts
75-0-88	This was an Information.	
75-0-89	U.S.A. v. Lewis	Bank Robbery. 2 counts.

Very truly yours,

s/ Dave
For the Firm

DSL/db

APPENDIX D

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, *for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.*

As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778. [Emphasis added]

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

[APPENDIX]

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*; nor shall private property be taken for public use without just compensation. [Emphasis added]